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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936.

No. 22.

State Board of Equalization of the State of California, et al.,
Appellants,

vs.

Young's Market Company, et al.,
Appellees.

BRIEF ON BEHALF OF APPELLANTS.

REFERENCE TO REPORT OF OPINION OF LOWER COURT.

The official report of the opinion of the United States District Court for the Southern District of California, Central Division, the lower court from which the appeal is taken in this proceeding, is found in *Young's Market Co. et al. v. State Board of Equalization et al.*, 12 Fed. Supp. 140.

Lower Court Opinion 12 Fed. Supp. 140.

STATEMENT OF FACTS.

Plaintiffs (appellees here), corporation and individual, citizens of the State of California, are engaged in the business in that State of importing beer made outside of said State, and distributing and selling the same at wholesale in California. They brought the action in the District Court of Southern California on behalf of themselves and all others similarly situated, to restrain the defendants, as officials of the State of California, from enforcing the provisions of the California Alcoholic Beverage Control Act as to beer importers. [R. 1, 42, 43.] All of the plaintiffs possess established places of business and warehouses in California where they store the beer and from which they distribute the same. One of them maintained such warehouses at twelve different cities in that State. [R. 14.] None of the plaintiffs maintain or operate any brewery. [R. 2, 3.]

Plaintiffs Resident Importers and Wholesalers.

Some Plaintiffs Have Warehouses in Several Cities in State.

These plaintiffs have been importing such beer into California from Missouri and Wisconsin direct to their several warehouses. The transportation charges are less in so doing than if the beer were imported by each or any plaintiff to one point only in California, and then redistributed from such central point or points to the different warehouses. [R. 13, 14, 15.] The defendant Board, entrusted with the administration of such Act, had ruled

Shipping Charge Less When Sent Direct to Each Warehouse.

that an importer was required to procure a separate license for each point within the State to which alcoholic beverages were shipped to him from a point outside the State. [R. 46.]

Plaintiffs Licensed Wholesalers.

All of the plaintiffs were also wholesalers of beer and had secured and were operating under the requisite licenses as provided in said Act to engage in the business as wholesalers in that State. [R. 13, 14, 15, 16, 17.]

Never Applied for Importers' Licenses.

Plaintiffs have refused to apply for and obtain importers' licenses for various or any of the places of business to which they import beer, and the defendants have threatened in their official capacity as officers of the State of California, to enforce against plaintiffs all of the provisions of the said Act. [R. 19, 56.]

A. B. C. Act Only Liquor Regulation.

The right to manufacture, possess, sell, and use beer within the State of California is limited, restricted or prohibited only by the provisions of the said Alcoholic Beverage Control Act, and there is no other statute regulating or pertaining to the importation of beer into such State. [R. 9, 10, 47.]

Each of the plaintiffs had been engaged in the importation, sale, and distribution of beer in California for at least a year next preceding the commencement of the action in the lower court, and had expended a considerable sum of money, by advertising and otherwise, in developing

Value of Importing Business.

such business and creating a demand among its customers for such beer manufactured outside of the State of California; and the value of such beer which each plaintiff had annually purchased, imported, and sold in such State, amounted to a sum in excess of $25,000.00. The plaintiffs intend and plan to continue such business in the same manner and have placed orders and made arrangements for so doing. [R. 54.]

There are approximately 34 breweries in the State of California, and such beer brewed in that State is in competition with beer imported into the State by plaintiffs. The price at which the beer imported into the State of California may be sold at wholesale, as compared with the prices at which beer manufactured in such State may be sold at wholesale, is an item entering into the saleability of such imported beer. [R. 55.]

Competition Between Local and Imported Beer.

The matter was heard in the District Court before a regularly constituted three judge court organized under the provisions of Section 380 of the United States Code Annotated upon the application of plaintiffs for an interlocuctory injunction. It was stipulated that the application for such temporary injunction be heard upon the Bill of Complaint and upon the defendants' return to the order to show cause, and further, that the issues for determination were of law and not of fact, and that there would be nothing additional to be presented upon a final

Preliminary Hearing as Final Disposition in District Court.

hearing for permanent injunction and that, therefore, the decree of the court upon such hearing should be considered as the final disposition of the cause in such court without further hearing of proof. It was concededed by defendants that the plaintiff, Simon Levi Company, Ltd., had been and was then operating twelve separate warehouses in the State, at each of which it had been importing beer from outside of such State, and that under the ruling of the defendant Board, to continue doing so it would be required to obtain a separate beer importer's license for each of said warehouses at a cost of $500.00 each, or $6000.00 for the twelve.

A. B. C. Act Held Unconstitutional as to Imports.

The lower court decided that the provisions of the California Act relative to imports of alcoholic beverages were invalid as violative of the commerce clause of the Federal Constitution and granted an injunction against the enforcement thereof.

ANALYSIS OF CALIFORNIA ALCOHOLIC BEVERAGE CONTROL ACT.

For the convenience of the Court, we will briefly refer to the pertinent provisions of the Act as are germane to the questions here before the Court. The complete Act is set out in full in the Statement as to Jurisdiction, pages 5 to 55 inclusive.

After the adoption of the Twenty-first Amendment to the Federal Constitution, the people of the State of California, on Nov. 6, 1934, amended Section 22 of Article XX of their State Constitution.

1934, Nov. 6, State Constitution Amended.

By this constitutional amendment it was provided that: ". . . The State Board of Equalization shall have the exclusive power to license the manufacture, *importation* and sale of intoxicating liquors in this State, . . . It shall be unlawful for any person other than a licensee of said board to manufacture, *import* or sell intoxicating liquors in this State."

1935, June 13, A. B. C. Act Enacted.

In accordance with this constitutional amendment, the legislature on June 13, 1935, enacted the Alcoholic Beverage Control Act.

This Act defined "Importer" (Sec. 2 (k), Jurisdictional Statement p. 12) as:

Importer Defined.

"(k) 'Importer' means every person who, in the case of alcoholic beverages brought into this State from outside of this State, is the first in possession thereof within this State after the act of importation is completed."

It then provided (Sec. 3, Juris. Stat. p. 14) that any person performing any act which would constitute such person an importer would be guilty of a misdemeanor unless duly licensed, and fixed the annual license fee for beer importers at $500.00 (Sec. 5 (8), Juris. Stat. p. 15).

Beer Importer License Fee, $500.

License privileges were defined as (Sec. 6 (d), Juris. Stat. p. 17):

> "(d) Any importer's license authorizes the person to whom issued to become an importer of alcoholic beverages specified in the license and to export such alcoholic beverage."

License Required for Each Place of Importation.

"Separate licenses" were required "for each of the premises of any business establishment having more than one location." (Sec. 7, Juris. Stat. p. 18.) Further elucidating this requirement, the Board promulgated a rule providing that [Rule 9a, R. 46]:

> "A licensee holding an importer's license for one premise may not have alcoholic beverages shipped to him from a point outside the State directly to an-another premise in this State for which he has not been issued an Importer's license."

It was further stated in such Rule that, "Beverages may be shipped from points outside the State only to premises for which Importer's licenses have been issued." But that, "After the beverages have been delivered to the premises for which the consignee holds an Importer's license, he may, if he desires to do so, reship them to other

premises for which appropriate wholesale or retail licenses have been issued."

Importer's License Only Authorizes Receipt.

The Importer's license did not authorize bottling, preparation or selling in any manner, nor did any other license authorize importation. [Rule 9(e), R. 47.]

License Application.

Sections 10 and 11 of the act (Juris. Stat. pp. 19 and 20) provided for the manner of making application for licenses and investigation and refund of fees.

An excise tax was also imposed upon all manufactured and imported beer sold within the State (Sec. 23, Juris. Stat. p. 23), and every manufacturer and importer of beer was required to post a bond to assure the payment of such excise tax (Sec. 25, Juris. Stat. pp. 24 to 26). They were also required to render monthly reports of the amount of liquor sold (Sec. 26, Juris. Stat. p. 27).

Excise Tax

Section 31 of the Act provided for the collection of all taxes, interest or penalties.

Carriers May Deliver Only to Licensed Importers.

Carriers were prohibited from transporting liquor into the State unless it was consigned to a duly licensed importer (Sec. 49, Juris. Stat. pp. 45, 46).

The lower Court held all these provisions [R. 57 to 61], except Sections 23, 25, 26, and 31 relative to excise taxes, "invalid, void and unconstitutional" [R. 57], and stated that they imposed discriminatory burdens [R. 61] upon imported beer and were "not a valid exercise of the police powers of said State, but constitute unlawful burdens upon interstate commerce, in violation of the Constitution of the United States." [R. 62.]

SPECIFICATIONS OF ERROR TO BE URGED.

1. The District Court erred in finding and holding that the California Alcoholic Beverage Control Act is invalid, void, and unconstitutional in either or any and in each and all of the following particulars, terms, and provisions thereof, to-wit:

(a) Section 2, subsection (k) thereof, which reads:

"'Importer' means every person who, in the case of alcoholic beverages brought into this State from outside of this State, is the first in possession thereof within this State after the act of importation is completed."

insofar as said subsection refers to a person who imports, receives or possesses beer brought in to the State of California from outside said State.

(b) Section 3 thereof, which reads:

"On and after July 1, 1935, no person shall perform any act or acts which would constitute such person a manufacturer, rectifier, importer, wholesaler, or retailer of any alcoholic beverage within the meaning of this act or shall package, label or sell any alcoholic beverage unless such person is authorized to do so by a license duly issued pursuant to the provisions of this act, or pursuant to the provisions of the State Liquor Control Act, Chapter 658, Statutes of 1933; any person violating any provisions of this section shall be guilty of a misdemeanor."

insofar as said section applies or refers to a beer importer's license or requires a beer importer's license of a person who imports, receives or possesses beer brought into the State of California from outside said State.

(c) That portion of Section 5 thereof, reading as follows:

"The following are the types of licenses to be issued under this act and the annual fees to be charged therefor:

* * * * * * * * * *

8. Beer importers' license $500.00 per year

* * * * * * * * *"

insofar as it refers to "beer importer's license" and the fee to be charged therefor:

(d) That portion of Section 6 thereof reading as follows:

"Except as otherwise provided in this act and subject to the provisions of section 22 of Article XX of the Constitution, the licenses provided for in the preceding section shall authorize the person to whom issued to exercise the following rights and privileges and no others at the premises for which issued during the year for which issued.

* * * * * * * * * *

(d) Any importer's license authorizes the person to whom issued to become an importer of alcoholic beverages specified in the license and to export such alcoholic beverage.

* * * * * * * * *"

insofar as it refers to a person who imports, receives or possesses beer brought into the State of California from outside said State.

(e) That portion of Section 7 thereof reading as follows:

"Each license issued under this act shall be issued to a specific person, and * * * shall be issued for a specific location, the principal address of which shall

be indicated on the license. Separate licenses shall be issued for each of the premises of any business establishment having more than one location.

* * * * * * * * *

Each license issued under this act is separate and distinct, shall be nontransferable from one person to another, and shall be transferable from the premises for which issued only as may be permitted by the board, upon payment of a transfer fee of five dollars for each license.

* * * * * * * * *"

insofar as it applies to or refers to a beer importer's license for a person who is the first in possession of beer brought into the State of California from outside said State.

(f) Section 49 thereof, which reads:

"Common or private carriers shall transport alcoholic beverages into the State only when such alcoholic beverages are to be consigned to a licensed importer. The carrier must obtain the receipt of such importer for the alcoholic beverage so transported and delivered and, if the consignee refuses to give a receipt and show his importer's license to the carrier, the carrier shall be relieved of all responsibility for delivering said alcoholic beverage. Where the consignee is not a licensed importer the carrier shall immediately notify the board at Sacramento, giving full details as to the character of shipment, point of origin, destination, and address of the consignor and consignee and within ten days such alcoholic beverage shall be summarily forfeited to the State of California and shall be turned over to the board for sale at public auction."

insofar as it refers to the transportation, importation, carriage or delivery of any beer into the State of California from outside said State, or the duties of any carrier in respect thereto, and insofar as it purports to provide for the forfeiture of any beer.

(g) Sections 10 and 11 of said Act insofar as said sections refer to a beer importer's license for a person who imports, receives or possesses beer brought into the State of California from outside said state.

(h) Section 31 of said Act, insofar as said section applies to beer importers' licenses, or the license fee therefor.

2. The District Court erred in finding and holding that subdivisions a, b, d, and e, or any or either of them, of Rule 9 promulgated by the State Board of Equalization (appellant here) under and by virtue of the terms of the California Alcoholic Beverage Control Act are invalid, void and unconstitutional insofar as the same apply to a person who imports, receives, or possesses beer brought into the State of California from outside said State, or purport to limit the shipment or delivery of such beer to the holder of a beer importer's license.

3. The District Court erred in finding and holding that the aforesaid provisions of the California Alcoholic Beverage Control Act, or any or either of such provisions, impose any discriminatory burdens upon plaintiffs (appellees here) in their business of importing into the State of California in interstate commerce beer manufactured without said State, and that the same constitute unlawful

burdens upon interstate commerce in violation of the Constitution of the United States.

4. The District Court erred in finding and holding that the aforesaid provisions of the California Alcoholic Beverage Control Act, or any or either of them, are not a valid exercise of the police powers of said State.

5. The District Court erred in finding and holding that the classification of importers under the California Alcoholic Beverage Control Act as a class distinct from others engaged in the liquor business is unreasonable and arbitrary, and unlawfully discriminates between wholesalers of beer imported into the State of California and wholesalers of beer manufactured in said State to the detriment of the former.

6. The District Court erred in finding and holding that the imposition of an importer's license at each of plaintiffs' (appellees here) points of distribution is a direct charge upon the beer so imported and upon the prices at which said imported beer may be sold within the State of California, and is a discrimination and charge as against such beer so manufactured outside of the State of California and in favor of the beer manufactured within the State of California.

SUMMARY OF ARGUMENT.

POINT ONE.

Immunity Clause.

Art. IV, Sec. 2, Clause 1 of the U. S. Constitution does not apply to the regulation of intoxicating liquors.

State v. Hodgson, 66 Vt. 134, 28 Atl. 1039. (Affirmed 168 U. S. 262, 273, 18 S. C. 80, 42 L. ed. 461.)

Neither does it apply to citizens of the State (appellees) whose statute is attacked.

Bradwell v. Illinois, 83 U. S. 130, 138, 21 L. ed. 442;

Bozeman v. State, 7 Ala. App. 151, 61 So. 604;

Hawkins v. Hawkins, 350 Ill. 227, 183 N. E. 9.

POINT TWO.

Fourteenth Amendment.

Intoxicating liquors and the regulation and control thereof do not come within the protection of the 14th Amendment to the U. S. Constitution.

Bartemeyer v. Iowa, 18 Wall. (U. S.) 129;

Mugler v. Kansas, 123 U. S. 623, 8 S. C. 273, 31 L. ed. 205;

Kidd v. Pearson, 128 U. S. 16, 9 S. C. 6, 32 L. ed. 346;

Crowley v. Christensen, 137 U. S. 91, 11 S. C. 13, 34 L. ed. 620;

Cox v. Texas, 202 U. S. 446, 26 S. C. 671, 50 L. ed. 1099;

Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311, 320, 37 S. C. 180, 61 L. ed. 326;

Crane v. Campbell, 245 U. S. 304, 38 S. C. 98, 62 L. ed. 304;

Barbour v. Georgia, 249 U. S. 454, 39 S. C. 316, 63 L. ed. 704;

Samuels v. McCurdy, 267 U. S. 188, 45 S. C. 264, 69 L. ed. 568;

State v. Parker, 236 Mo. 219, 139 S. W. 453.

POINT THREE.

Commerce Clause.

The provisions of the California Alcoholic Beverage Control Act are not unconstitutional and do not contravene the commerce clause, Art. I, Sec. 8, Clause 3, of the U. S. Constitution because the application and protection of such clause has been removed from intoxicating liquors in the present instance.

The spirit of self government as exemplified in local control of the liquor problem has been constantly voiced by the American people, with the result that Federal legislation has progressively restricted the force of the commerce clause over interstate transportation, finally culminating in the 21st Amendment.

The decision in *Leisy v. Hardin* resulted in the enactment by Congress in 1890 of the Wilson Act. This Act removed the character of interstate commerce from inter-

state shipments of liquor upon completion of delivery and before sale in the original packages, but prohibited the States from exercising any control over such imported liquor not equally exercised over domestic liquor.

The Webb-Kenyon Act, passed by Congress in 1913, designedly omitted all of the prohibitions of the Wilson Act against discrimination by the States between domestic and imported liquors, and prevented the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws.

This last Act prohibited the transportation of liquor into any State when such liquor was intended to be received, possessed, sold, or in any manner used in violation of any law of such State. The States could regulate as well as prohibit, could require inspection and records of shipments and could impose license fees and necessity for permits upon such importations.

Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311, 37 S. C. 180, 61 L. ed. 326;

Seaboard Ry. v. N. Carolina, 245 U. S. 298, 38 S. C. 96, 62 L. ed. 299;

McCormick v. Brown, 286 U. S. 131, 52 S. C. 522, 76 L. ed. 1017.

It had been urged that notwithstanding the fact that the Webb-Kenyon Law removed the ban against discrimination contained in the Wilson Act, nevertheless, if the State recognized liquor as an article of commerce it

might regulate its use and the traffic therein, but the commerce clause still prevented any discrimination.

When it came to a consideration of the wording of the 21st Amendment Senator Glass proposed a change which he said would meet the objection that Congress was undertaking to interfere with interstate commerce between States which recognized liquor as an article of commerce. Congress rejected this proposed change, and proposed the Amendment in the short, simple, concise form in which it was adopted, stating that its purpose was to give a constitutional guarantee that the transportation of intoxicating liquor into any State in violation of its laws shall be forever prohibited.

The effect of the 21st Amendment is to restore to the States their full, original sovereignty to deal with intoxicating liquors within their boundaries as they see fit, free from any restrictions of interstate commerce.

The only instances wherein the commerce clause now has any application to intoxicating liquors is where a State has no laws whatsoever dealing therewith, and to prevent States from interfering with trans-shipments which are not delivered or used within the boundaries of the State.

The presence of the comma in front of the phrase "in violation of the laws thereof", prevents such phrase from being construed to apply only to the preceding word "use".

The laws of California here in question regulate the use and transportation of liquor. Plaintiffs (appellees here) seek to import liquor into California for delivery and use therein and contrary to and in violation of its laws. It was error to enjoin the State officials from preventing such importations upon the ground that such California laws violated the 14th Amendment and the commerce clause of the U. S. Constitution.

POINT FOUR.

Discrimination.

Assuming the commerce clause to be applicable, the provisions of the California Act are not violative of such clause because they do not discriminate against importations of beer.

The lower court erred in treating of wholesalers of imported beer and wholesalers of local beer, a distinction that does not exist, the Act providing for only one classification of "wholesaler" who may deal in either local or imported beer or both.

"Importers" under the Act are comparable to "manufacturers". Each is an original source of beer as first produced within the State. As between these two, each may produce his beer at any one point within the State and sell the same in precisely the same manner upon payment by the manufacturer of a license fee of $750.00, and by the importer of two license fees (importers $500.00 and wholesalers $50.00) aggregating $550.00, or $200.00 less than the manufacturer.

POINT FIVE.

Unsupported Finding.

The finding by the lower court that importer's license fee is a direct charge upon price at which imported beer may be sold and a discrimination against such beer in favor of local beer was wholly unwarranted.

The allegation of the complaint upon which this finding was based was expressly denied by the defendants' return thereto. No supporting affidavits nor evidence of any kind was presented to the Court.

Based upon plaintiffs' claims of amount of beer imported and sold by them the distribution of license fees as item of cost would be so infinitesimal as to be practically unascertainable.

Manufacturers' license fees would enter into cost of local beer in similar manner and larger amount thus eliminating actual discrimination.

Separate licenses for one importer for separate points of importation in State comparable to separate licenses required of manufacturer who desires branch plants at separate points within State and so discrimination is eliminated upon this point.

ARGUMENT.

The constitutionality of the California Alcoholic Beverage Control Act relative to beer imports was attacked by plaintiffs (appellees here) in the court below upon the ground that it violated; (1) the commerce clause (Art. I, sec. 8, cl. 3), (2) the due process and equal protection clause (14th Amendment), and (3) the immunity clause (Art. IV, sec. 2), [see Bill in Equity, par. VIII, R. 10].

Constitutional Provisions Urged.

The conclusions of law of the District Court were that such provisions of the Act and certain rules and regulations of the defendant Board (appellants here) imposed discriminatory burdens upon the importation of beer and are not a valid exercise of the police powers of the State, and constitute unlawful burdens upon interstate commerce in violation of the United States Constitution [4th Conclusion of Law, R. 61].

Lower Court's Conclusions of Law.

In its opinion the lower court stated that these provisions contravene the commerce clause and the equal protection clause of the United States Constitution [R. 40]. We shall proceed to take up these three alleged grounds of unconstitutionality in the reverse of the order first above stated.

Lower Court's Opinion.

The Immunity Clause.

Article IV, section 2, clause 1, of the United States Constitution provides that:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Purpose of Immunity Clause.

The sole purpose of this provision has been held to be to "declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the right of citizens of other states within your jurisdiction." (*Slaughter-house* cases, 16 Wall. 77, 21 L. Ed. 394; *Detroit v. Osborne,* 135 U. S. 492, 10 S. C. 1012, 34 L. Ed. 260.)

Liquor Regulation Not Subject to Immunity Clause.

The regulation of the possession, use, and sale of intoxicating liquors is within the police power of the state and is not one of the privileges or immunities of citizenship within the protection of this provision of the Constitution. (*State v. Hodgson,* 66 Vt. 134, 28 Atl. 1039. Affirmed 168 U. S. 262, 273, 18 S. C. 80, 42 L. Ed. 461.)

The protection designed by this clause has been said to have no application to the citizens of the State whose laws are complained of, so that such citizen may not raise the question that the law of his own State is violative of this clause of the constitution. (*Bradwell v. Illinois,* 83 U. S. 130, 138, 21 L. Ed. 442; *Bozeman v. State,* 7 Ala. App. 151, 61 So. 604; *Hawkins v. Hawkins,* 350 Ill. 227, 183 N. E. 9.)

The District Court made no reference to this alleged ground of unconstitutionality either in its opinion or in its conclusions of law, and we think it is quite apparent that this provision of the Constitution has no direct bearing upon the matters here involved.

Fourteenth Amendment.

The character of the liquor traffic is such that it cannot invoke those constitutional guarantees which protect other personal and property rights. Intoxicating liquors do not come within the protection of the 14th Amendment, nor of Article IV, Sec. 2 of the Constitution, and the right to possess, make, or deal in such liquors is not a privilege or immunity of citizens of the United States, and, therefore, State legislation prohibiting the importation of liquor or restricting or regulating its manufacture, possession, use, importation, or handling, does not violate either this amendment or Sec. 2 of Article IV.

Liquor Not Within Protection of 14th Amendment.

Mugler v. Kansas, 123 U. S. 623, 8 S. C. 273, 31 L. Ed. 205;

Kidd v. Pearson, 128 U. S. 16, 9 S. C. 6, 32 L. Ed. 346;

Crowley v. Christensen, 137 U. S. 91, 11 S. C. 13, 34 L. Ed. 620.

In *Cox v. Texas*, 202 U. S. 446, 26 S. C. 671, 50 L. Ed. 1099, in discussing a statute of the State of Texas, which provided for taxes on sellers of spiritous, vinous, or malt liquors and required an application for a license to be accompanied by a bond, and containing a provision that

the same should not apply to wine produced from grapes grown within the State, the court recognized the discrimination and at page 450 said:

> "It is true that there is granted to the producers and manufacturers of wine from grapes grown in Texas an immunity in respect of that wine which is not granted to other sellers of the same wine. But to that extent alone, favor is shown to a class."

Replying to the contention that this was violative of the 14th Amendment, the court continued at page 451:

> "* * * If the States were restricted by the 14th Amendment only, and saw fit to encourage domestic production, or sought to promote temperance, or to help to secure pure wine, by statutes such as those before us, there would be nothing to hinder them."

The 14th Amendment does not protect liquor acquired prior to the effective date of a law prohibiting its possession.

> *Barbour v. Georgia*, 249 U. S. 454, 39 S. C. 316, 63 L. Ed. 704.

Neither does it protect such liquor from seizure and destruction without compensation.

> *Samuels v. McCurdy*, 267 U. S. 188, 45 S. C. 264, 69 L. Ed. 568.

A statute requiring a licensed pharmacist to procure a druggist's license in order to use liquor in the preparation of prescriptions is not violative of this Amendment.

> *Gray v. Conn.*, 159 U. S. 777, 15 S. C. 95, 40 L. Ed. 80.

In *Southern Express Co. v. Whittle,* 194 Ala. 406, 69 So. 652, an Alabama statute was upheld making it unlawful to bring liquor into the State.

A Missouri statute requiring manufacturers and dealers in liquor to take out a license except in respect to wines and spirits produced from grapes or fruits grown within the State was said not to violate the 14th Amendment.

State v. Parker Distilling Co., 236 Mo. 219, 139 S. W. 453.

In *Clark Distilling Company v. Western Maryland Ry. Co.,* 242 U. S. 311, 37 S. C. 180, 61 L. Ed. 326, the Court had under consideration a West Virginia Statute prohibiting the manufacture, sale, and possession of liquor, but not prohibiting the use thereof, unless that might be implied from the other prohibitions; and replying to the contention that the Statute was repugnant to the Fourteenth Amendment, said (page 320):

> "That government can, consistently with the due process clause, forbid the manufacture and sale of liquor and regulate its traffic, is not open to controversy; and that there goes along with this power full police authority to make it effective, is also not open. Whether the general authority includes the right to forbid individual use, we need not consider, since clearly there would be power, as an incident to the right to forbid manufacture and sale, to restrict the means by which intoxicants for personal use could be obtained, even if such use was permitted. This being true, there can be no doubt that the West Virginia prohibition law *did not offend against the due process clause of the Fourteenth Amendment.*"

Liquor Regulation Is Outside 14th Amendment.

In 1915 the State of Idaho had enacted a statute making it a penal offense "for any person to import, ship, sell, transport, deliver, receive, or have in his possession, any intoxicating liquors except as in this Act provided". Plaintiff Crane was arrested for having "in his possession a bottle of whiskey for his own use and benefit, and not for the purpose of giving away or selling the same to any person." He sued out a writ of *habeas corpus* and challenged the validity of the statute upon the ground that it contravened the Fourteenth Amendment. It came before the Supreme Court in *Crane v. Campbell,* 245 U. S. 304, 38 S. C. 98, 62 L. Ed. 304, and on pages 307 and 308, this Court answered such challenge as follows:

> "It must now be regarded as settled that, on account of their well known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment. Bartemeyer v. Iowa, 18 Wall. 129; Beer Company v. Massachusetts, 97 U. S. 25, 33; Mugler v. Kansas, 123 U. S. 623, 662; Crowley v. Christensen, 137 U. S. 86, 91; Purity Extract Co. v. Lynch, 226 U. S. 192, 201; Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311, 320, 321; Seaboard Airline Ry. v. North Carolina, *ante,* 298.
>
> "As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. Booth v. Illinois, 184 U. S.

Crane v. Campbell, 245 U. S. 304, 307.

425; Sills v. Hesterberg, 211 U. S. 31; Murphy v. California, 225 U. S. 623; and Rast v. Van Deman & Lewis Co., 240 U. S. 342, 364. And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose.

"We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge."

In view of the repeated and emphatic declarations of the highest Court of our land, an attack upon liquor laws as being in violation of the Fourteenth Amendment to the Federal Constitution hardly seems to merit serious consideration at this late date.

COMMERCE CLAUSE.

State's Right to Control Liquor.

The primary point to be determined here is the right of a State to control and to deal with its own liquor problem and in connection therewith, to prohibit or regulate the importation of liquor entirely free from any restrictions of the commerce clause of the Constitution of the United States.

The State of California enacted a statute known as the Alcoholic Beverage Control Act embodying a comprehensive system for the control and regulation of the use of and traffic in liquor within its borders. As a part of this system it sought to control all liquor at its source by

licensing all manufacture thereof within the State and all importation thereof into the State.

The lower court held that such provisions of the Act regulating importation of liquor were invalid as contravening the commerce clause of the Federal Constitution. Assignments of error 1, 2, 3, and 5 bear upon this question.

It is, of course, conceded that by the commerce clause, Article I, Section 8, clause 3, Congress was given complete and exclusive power and authority to regulate commerce between the several States. It remains to be seen how far Congress has waived its power in favor of the State, or has had such power abridged by subsequent constitutional amendments in the matter of intoxicating liquors.

Vicious Nature of Liquor Traffic.

It is an admitted fact that the people of this Nation have from the very beginning recognized the vicious danger lurking in the liquor traffic and the menacing character of that business, and have constantly striven to regulate and curb such traffic to the extent that it has always been absolutely prohibited in some portions of our country and for a time was so prohibited throughout the entire Nation.

Local Self-Government in Liquor Control.

The principle of local self-government has ever been popular with the American people. The wisest, most courageous, far-seeing, and constructive leadership these United States have ever enjoyed evolved from the local self-government of the New England town meeting and the burgesses of Virginia. And this principle of local self-government has never been more constantly exercised nor more zealously guarded than in its application

to the regulation of liquor, as is witnessed by the continuous existence of local option. To fully appreciate the removal of the regulation of the liquor traffic from without the confines of the commerce clause of the Constitution and to consider the various steps whereby the States have been restored to their complete sovereignty insofar as their power to control such liquor traffic is concerned requires some consideration of the historical progress by which these results were achieved. We have attempted to present such historical review in the appendix hereto, and we shall only briefly comment upon the same here.

Early in the history of our National government, certain of the New England States had enacted license laws requiring all persons engaged in the sale of intoxicating liquors within such States to be licensed in accordance with the terms of such statutes. In 1847 these statutes came before the Supreme Court of our land in what is known as the License cases. Chief Justice Taney wrote the leading opinion in the case. He took the position that while a shipment of liquor into a State came within the purview of the commerce clause of the Constitution and would, therefore, ordinarily be under the control of the Federal government, nevertheless, when Congress had not acted and had not assumed any control over the matter, it then remained within the power of the State, in the exercise of its police power, to control the sale of such liquor. Accordingly the Chief Justice upheld the license laws of those States on the theory that the police powers of the State should remain in force unless and until Congress had actually taken charge of the subject by legislating upon it.

License Cases.

That decision of our Supreme Court remained the law of the land for forty years. During that period more and more States adopted similar measures for exercising control of the liquor traffic and limiting the shipments of liquor into the State, and the system of such local State control became quite widespread.

In 1886 the State of Iowa passed a law forbidding common carriers to bring intoxicating liquors into that State, unless they were first furnished with a certificate that the consignee thereof was authorized to sell the same. This would have been a valid statute under the decision in the License cases because Congress had never legislated upon the subject and Iowa was simply exercising the police power which had been allowed to New Hampshire and the other New England States under the decision of Chief Justice Taney. But when this statute came before the Supreme Court in *Bowman v. Chicago, etc Ry. Co.*, 125 U. S. 465, in 1887, that Court directly repudiated the doctrine enunciated by Chief Justice Taney in the License cases and substituted the doctrine, as succinctly expressed by Chief Justice Field, at page 507, that:

Doctrine of License Cases Repudiated in Bowman v. Chicago Ry., 125 U. S. 465, 507.

> "The absence of any law of Congress on the subject is equivalent to a declaration that commerce in that matter shall be free."

Very shortly after the decision in the *Bowman* case another prohibition statute of the State of Iowa came before the Supreme Court in the case of *Leisy v. Hardin*, 135 U. S. 100. The theory of the former case was extended to afford the protection of the commerce clause to the *sale* of the imported liquor, the Court saying at page 124:

Leisy v. Hardin, 135 U. S. 100.

"Under our decision in Bowman v. Chicago, etc. Ry. Co. supra, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State."

But in this latter case the Supreme Court expressly indicated that the right of local control, which the State desired, should be sought from Congress, stating at page 108 that:

Supreme Court Suggests That Congress May Act.

"* * * A subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, *unless placed there by Congressional action.*"

And again at page 109:

"* * * Interstate Commerce * * * must be governed by a uniform system, so long as Congress does not pass any law to regulate it, *or allowing the State so to do,* * * *"

Congress lost no time in acting upon this suggestion of the Supreme Court and in less than six months after this decision Congress had enacted the Wilson Act. As originally introduced, this Bill unreservedly granted to the States complete power to prohibit, regulate, control, and otherwise govern the transportation of liquor into such States from beyond their several boundaries, wholly free from any limitations of the commerce clause.

It was recognized that this bill in its original form, left the States free to regulate the liquor traffic to the extent of protecting their domestic liquor industry against

Congress Deliberately Acts to Prevent Discrimination.

the competition of other States. Congress deliberately determined to prevent such discrimination, and in the final enactment provided for the control by the State of the liquor traffic "to the same extent and in the same manner as though such liquid or liquors had been produced in such State * * *."

It is unnecessary to comment upon the various decisions of the courts in construing the Wilson Act, many of which are set forth in the appendix hereto, other than to say that it was firmly established that under the provisions of the said Act, the protection of the commerce clause of the Federal Constitution was removed from intoxicating liquors as soon as delivery was made by the carrier to the consignee, and that thereafter such liquor came under all of the regulations of the State, provided, however, that such State could not discriminate against such imported liquors in any way, but must treat them in the same manner as all other liquors within the State.

Effect of Wilson Act.

The effect of these decisions, disclosing that the Wilson Act did not completely prohibit the importation of liquor, and a realization of the opportunity thus afforded unscrupulous persons to evade local liquor regulations, combined with the resultant growing public conviction that it was an abuse of the interstate commerce privilege to thus permit this means of frustrating the people's wishes, and above all, the ever-present and unquenchable desire on the part of the American citizenry to be free to exercise complete self-government in the control of liquor and the regulation of

Shortcomings of Wilson Act Drive Congress to Further Action.

Webb-Kenyon Act.

its traffic, again forced this problem upon the attention of Congress and resulted in the Webb-Kenyon Act.

As originally introduced, this legislation contained a second section in exactly the same wording as the Wilson Act, prohibiting any discrimination by the State and subjecting the imported liquors to the control of the State law only "to the same extent and in the same manner as though such liquids or liquors had been produced in such State."

After extended debate in Congress upon the question of retaining or striking out this second section, and thus prohibiting discrimination by the State, or permitting the same, Congress decided to give the State complete self-control of its liquor problems and the right to discriminate if it chose so to do, by completely eliminating the second section; and the Webb-Kenyon Act was enacted in its present form in 1913. It is also to be noted that this Act was passed over the veto of President Taft and in the face of his veto message distinctly informing Congress that the effect of the Webb-Kenyon Act was:

Congress Advisedly Discards Prohibition Against Discrimination.

> "To permit the States to exercise their old authority before they became States, to interfere with commerce between them and their neighbors."

The history of these two Acts thus affords a striking contrast. The Wilson bill, as originally introduced, contained no clause or reservation preventing discrimination against imported liquors, but was amended so as to expressly include such prohibition against discrimination. On the contrary, the Webb-Kenyon Act began its legislative life with its second section containing all of the prohibitions of the Wilson Act against discrimination, but this was expressly rejected by Congress and the Act finally enacted without any such reservation, even in the face of a Presidential veto emphasizing that very point.

Contrast Between Wilson and Webb-Kenyon Acts.

The Webb-Kenyon Act is the Congressional prototype of the Twenty-first Amendment, and the decisions of the courts in construing and applying it are particularly apt in the present instance. Probably the leading and most widely cited of these cases is that of *Clark Distilling Co. v. Western Maryland Ry.*, 242 U. S. 311. In clear and simple language, the Court there at page 321 defines the purpose of the act, and after discussing it in comparison with the Wilson Act, said of the Webb-Kenyon law:

Clark Distilling Co. v. Western Maryland Ry. Co.

> ". . . Its purpose was to prevent the immunity characteristic of interstate commerce from being used to prevent the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment,

receipt and possession to be applicable and controlling irrespective of whether the law did or did not prohibit the individual use of liquor. That such also was the embodied spirit of the Webb-Kenyon Act plainly appears since if that be not true, the coming into being of the act is wholly inexplicable."

That case, but for the fact that the West Virginia statute prohibited the importation, except in certain instances, instead of licensing it, was very similar in principle to the present case. The same arguments were advanced and the same line of reasoning was urged by the Distilling Co. there as urged by plaintiff below and followed by the lower Court here, to-wit, that (page 314):

Similarity to Present Case.

"Where the State law permits the citizen to purchase liquors, carry them to his home, keep them there for personal use and use them, a law which punishes the receipt of liquor for personal use from a common carrier is not a police measure authorized by the Webb-Kenyon law, but is, in so far as it applies to interstate shipment, a law regulating commerce in violation of the commerce clause of the Constitution."

Adams Express Co. v. Kentucky.

The language of the Court in *Adams Express Co. v. Kentucky*, 238 U. S. 190, as found on page 202:

"It therefore follows, that, inasmuch as the facts of this case show that the liquor was not used in violation of the laws of the State of Kentucky, as such laws are construed by the highest Court of that State, the Webb-Kenyon law has no application and no effect to change the general rule that States may not regulate commmerce wholly interstate."

has sometimes been used as authority for the contention that if the State law does not prohibit the use of liquor entirely, it cannot regulate its importation, as the Webb-Kenyon law would have no application, except in those instances where its use was so prohibited.

Adams Exp. Co. Case Limited.

Such a construction of the decision in the *Adams Express Co.* case was, however, directly refuted in the *Clark* case, where the Court said, referring to such a contention (page 324):

> "All that was decided in that case was that as the Court of last resort of Kentucky into which liquor had been shipped had held that the State statute did not forbid shipment and receipt of liquor for personal use, therefore, the Webb-Kenyon Act did not apply, since it only applied to things which the State law prohibited."

To further emphasize this point, this Court continuing in its opinion in the *Clark* case referred to the case of *Van Winkle v. the State,* 27 Delaware 578. The law in Delaware did prohibit shipment of liquor into local option territory, and the Supreme Court of that State in the case referred to had held that the Webb-Kenyon law did not apply because the State law did not prohibit the use of such liquor, and cited the Kentucky case of *Adams Express Co. v. Commonwealth,* 154 Kentucky 462.

Van Winkle v. State Repudiated.

This Court directly disagreed with the *Van Winkle* decision and stated (page 325) that:

> ". . . It necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that act did not simply forbid the introduction

of liquor into a State for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by State law."

The language of the *Clark* case was reiterated in *Seaboard Airline Ry. v. North Carolina,* 245 U. S. 298, 303. The North Carolina law did not prohibit, but did restrict, the use of and traffic in liquors, and it contained a provision requiring all carriers transporting any liquors to keep certain records thereof open for inspection. It was held that a shipment from without the State was not free from this restriction because within the protection of the commerce clause, as the Webb-Kenyon Act had removed that protection. Other than being a burden upon such interstate commerce, it does not appear that there was any discrimination, as this requirement appears to have applied equally to intrastate as well as interstate transportation.

The Reed Amendment enacted in 1917 by Congress and the Eighteenth Amendment to the Constitution effective in 1920 do not throw any light upon the question here before us, other than as they evidence the continuous, ever present pressure on the part of the American public for stringent regulation of and a tight curb upon the liquor traffic.

In 1932 in the case of *McCormick & Co. v. Brown,* 286 U. S. 131, this Court, through its present Chief Justice, declared that the Webb-Kenyon Act was still in effect and had not been repealed by the Eighteenth Amendment nor the National Prohibition Act. The Court there upheld another West Virginia statute heavily restricting, but not prohibiting, liquor traffic and requiring

McCormick v. Brown.

non-residents to take out a permit at an annual fee of fifty dollars before selling or furnishing any liquor to any place within that State. If any doubt remained as to the extent of the application of the Webb-Kenyon Act in removing the protection of the commerce clause from interstate liquor shipments, it was removed by the opinion of the Court in this case. At page 143 it is said:

> "The appellants make the further point that the Webb-Kenyon Act applies only where there is an intent to violate the laws of the State into which the shipment is made. . . . The argument is that no intent to violate the laws of West Virginia can be imputed to the appellants. It is said that they ship their product only to licensed dealers in West Virginia, that is, to those who are authorized by State Commissioner of Prohibition 'to receive, store, and sell the same.' The short answer is that the State law does not make permits issued to [illegible]ealers a substitute for the permits required of wholesale dealers. If the provision of the State law, and the regulations under it, which expressly require State permits for sales by wholesale dealers of the products in question, are valid, it necessarily follows that sales by appellants of these products without such permits would be in violation of the State law within the meaning of the Webb-Kenyon Act. The appellants in making the sales are obviously interested persons, and the shipment of their products into the State for the purpose of there consummating their sales without prescribed permits would fall directly within the terms of that act."

On March 22, 1933, while the Twenty-first Amendment was pending before the States for ratification, Congress passed the Collier act, which provided that certain beverages, including beer, "may be divested of their interstate character in certain cases, the shipment or transportation thereof in any manner or by any means whatsoever from one State . . . into any State . . . in violation of the laws thereof . . . is hereby prohibited." This act was repealed in 1935 after the adoption of the Twenty-first Amendment, and is not particularly pertinent here, except as again manifesting the continuous agitation in and purpose of Congress to permit the States to completely control the liquor traffic without any interference arising out of the commerce clause.

Collier Act.

This brings us to a consideration of the Twenty-first Amendment to the Constitution effective Dec. 5, 1933, and which is now the supreme law of the land upon this subject. As such Amendment was originally proposed in Congress in December, 1932, it provided for the abrogation of the commerce clause of the Constitution as regards liquor *only* in those States where "if the laws in force therein *prohibit* such transportation or importation". When it came out of the Senate Judiciary Committee it had been entirely rewritten and was in precisely its present form, with the exception that it contained an additional paragraph, number 3, which provided that:

Congressional History of 21st Amendment.

> "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold."

This section was eliminated by Congress before submission to the States, principally upon the ground that it was an effort to continue the power of Congress to participate in the control of the liquor traffic and was out of keeping with the spirit of the proposed amendment and the demand of the people that the State be allowed full and complete self-government and control in so far as liquor and the regulation thereof is concerned without any interference on the part of Congress or the Federal Government.

There was not the slightest question as to the purpose and intent of this Amendment in the minds of anyone.

Senator Blaine.

Senator Blaine, representing the Judiciary Committee, referring to the present second paragraph of the Amendment, said (Vol. 76, Cong. Rec., p. 4143):

> ". . . The purpose of Section 2 is to restore to the States by Constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the State . . ."

Senator Glass' Proposal.

Senator Glass of Virginia offered an amendment restricting the application of the proposed Constitutional amendment to strictly prohibition States, and in explanation of this, the Senator said at page 4219 of the same volume:

> "So, I have met the objection that we are undertaking to interfere with interstate commerce as between States which authorize the manufacture, transportation, and sale of liquors; . . ."

Thus, it will be seen that Congress had squarely before it the question of whether or not it should propose a Constitutional amendment (1) completely removing the protection of the commerce clause from the shipment of liquor into States, when such shipment would be contrary to any law or regulation of such State; or (2) an amendment merely forbidding interstate shipments into prohibition States, but retaining the protection of the commerce clause over such interstate shipments into States which recognized liquor as an article of commerce and merely regulated it but did not prohibit the same. Congress chose the *former* and in the language of Mr. Rep. McSwain, "the proposed amendment" is "to give a constitutional guarantee that the transportation or importation into any State of intoxicating liquors, in violation of the laws of such State, shall be prohibited forever".

Congress Squarely Decides Upon Complete State Control.

We have commented upon the history of this Amendment only to emphasize the very emphatic manner in which Congress demonstrated its intent to restore to the several States their full sovereignty in the control and handling of the liquor problem, for it seems to us that the language of the Amendment of itself is so plain that "He who runs may read".

As was said by Mr. Justice Day in the *Adams Express Co. case,* 238 U. S. 190 at page 199:

> "It is elementary that the first resort, with a view to ascertaining the meaning of a statute, is to the language used. If that is plain there is an end to construction and the statute is to be taken to mean what it says."

The contention heretofore urged that the inhibition against transportation or importation applied only when the use of such liquor was in violation of the laws of the State and not only when the transportation itself was in such violation finds no support in this Amendment, and, in fact, is impossible in the face of the language and composition used.

Phraseology of Amendment Allows of But One Construction.

If the phrase "in violation of the laws thereof" were intended to qualify or restrict the phrase "for delivery or use therein of intoxicating liquors", or any part thereof, alone, it would not be separated from it by a comma, but would follow without any intervening punctuation. This intervening comma is obviously inserted to prevent the phrase "in violation of the laws thereof" from referring to or restricting only the "delivery" or "use" or the phrase "for delivery or use therein of intoxicating liquors".

The compound subject "transportation or importation" is what is prohibited. Such transportation or importation is prohibited when the same is "in violation of the laws" of the State, or any manner contrary to any such law or laws. Such transportation or importation, in order to be prohibited, must further be for use or delivery within the State. This Amendment does not permit the State to interfere with shipments of liquor from points without the State to points beyond the State; in other words, the protection of the commerce clause still clings to such shipments made across or through a State, when the same are not delivered or used therein.

As set forth in our appendix hereto, the extent to which the Twenty-first Amendment has removed intoxicating liquors from the protection of the commerce clause has been passed upon by the District Courts of the United States in eight instances, in one of which, Georgia, we are not advised of the purport of the decision. In four of such decisions, it was squarely and emphatically held that if the shipment of liquor into the State in any manner contravened any of its laws, it was prohibited by this Amendment. In two of such decisions, including the one from which this appeal is being prosecuted, it was held that the Twenty-first Amendment did not apply to those States that recognized liquor as an article of commerce and did not absolutely prohibit its use and the traffic therein. The Court in the *Triner* case declined to pass upon this point, and rested its decision entirely upon a violation of the Fourteenth Amendment. It seems to us that an examination of these several opinions discloses that considerably more forceful reasoning is used and extended consideration given the subject in the four cases in which the Twenty-first Amendment is held to remove importation of liquor from the protection of the commerce clause where such importation in any manner violates any law of the State, than in the other decisions where such Amendment is held not to apply if the State recognizes liquor as an article of commerce in any way at all.

District Court Decisions Construing 21st Amendment.

Triner v. Arundel, 11 F. Supp. 145.

Without in any way attempting to criticize the opinion of the lower Court in the present case, we should like to

point out what appears to us to be the somewhat meager consideration apparently given to this question there. It is said to have been the contention of the defendants (appellants here) that "since the adoption of the Twenty-first Amendment to the United States Constitution, neither the commerce clause nor the equal protection clause of the United States Constitution applies to intoxicating liquors". If such was the understanding of our contention in the Court below, it was either a misapprehension or the result of inaccuracy in our statements. To state our position more accurately and with greater particularity, it is, that the commerce clause does not apply to intoxicating liquors when shipments thereof are made into a State for use or for delivery in such State, and when such shipments are in some manner contrary to some law or regulation of that State. If such liquor were merely being transported across or through such State, the commerce clause would still protect it from any interference on the part of that State; and if the shipment of liquor into a State in nowise conflicted with any of its laws or regulations or if the State had made no laws or regulations whatsoever pertaining to liquor, such shipment would then remain within the protection of the commerce clause. The statement in the *Triner* case, quoted as authority for its position by the lower Court in the instant case [R. 36], does not hold such position as just stated untenable, but only declares that the Twenty-first Amendment does not exempt *all* liquor from the influence of the commerce clause without further qualification. It is in its failure to keep before it and to recognize this distinction which

Comment on Opinion of Lower Court in Present Case.

Statement of Appellants' Position.

we have indicated, that the lower Court in the instant case in our opinion erred.

This distinction was recognized by the District Court of Missouri in the *Becker* case; and in holding that a State law discriminating between wholesalers of local and of imported liquors was valid because the Twenty-first Amendment had removed such imported liquors from the protection of the commerce clause, it stated that this conclusion was in complete accord with the statement of the Court referred to above in the *Triner* case. The Court here said "that the amendment does recognize the authority of the State to regulate the movement of liquor into the State, and where availed of, the importation of intoxicating liquors in violation of local law is outside the commerce clause."

General Sales & Liquor Co. v. Becker, 14 F. Supp. 348.

The Court below in the instant case, apparently resting upon the quotation from the *Triner* case above mentioned, and without further discussion, concluded that the Twenty-first Amendment had no application to the present case. It then proceeded to discuss and consider the regulations upon importation as a matter of discrimination entirely apart from the liquor characteristics. The cases relied upon by the lower Court in this connection, *Darnell & Son v. Memphis,* 208 U. S. 113, related to logs and lumber. *Guy v. Baltimore,* 100 U. S. 434, related to a cargo of potatoes. *Webber v. Virginia,* 103 U. S. 344, related to Singer Sewing Machines, and, the only case relating to liquor, that of *Walling v. Michigan,* 116 U. S. 446, was decided in 1885,

Comment on Citations in Opinion of Lower Court.

and subsequent legislation, such as the Wilson Act and Webb-Kenyon Act and the Twenty-first Amendment, have made it an anachronism. The quoted excerpts from the opinion of this Court in *Baldwin v. Selig,* 294 U. S. 511 [R. 39] would be most pertinent and apt if milk, the subject there under consideration, had been removed from the protection of the commerce clause as liquor has been. We call attention, in passing, to the fact that the lower Court nowhere mentioned the Webb-Kenyon Act, nor any of the decisions thereunder.

Premier-Pabst Sales Co. v. McNutt, U. S. D. C. (Ind.) 1-4-35.

The Indiana statute, which the District Court upheld in the *McNutt* case, not only restricted the number of importers but also imposed a license fee of $2,500 upon wholesalers of imported liquor, while wholesalers of local liquor were required to pay only $1,000. The Court there reached its conclusion after considerable discussion of the decisions under the Wilson and Webb-Kenyon Acts. It also referred to a decision of the State involving the same statute in *Fry v. Rosen,* 198 N. E. 375, in which such Court had said that "a vendor of alcoholic malt beverages who does business outside of Indiana has no right or privilege to transport such beverages into Indiana by reason of any protection afforded by the interstate commerce clause of the Federal Constitution." Attention was directed to the fact that an appeal was prosecuted from that decision to the United States Supreme Court, which latter Court dismissed the same upon the grounds that the jurisdictional statement failed to disclose any properly presented substantial Federal question (*Rosen v. Fry,* 296 U. S. 526, 55 S. C. 143, 79 L. ed. 636), al-

though paragraph 4 of such jurisdictional statement stated that it was the contention of appellant that this provision of the act was repugnant to the commerce clause and to the Fourteenth Amendment.

Premier-Pabst Sales Co. v. Grosscup, 12 F. Supp. 970.

The Pennsylvania statute under consideration in the *Grosscup* case, and which was upheld by the District Court and affirmed on appeal by this Court, May 18, 1936, 56 S. C. 754, but without passing upon this question, levied a license fee of $400.00 upon distributors of local beer and $900.00 upon distributors of imported beer.

General Sales & Liquor Co. v. Becker, 14 F. Supp. 348.

In the *Becker* case the Missouri statute exacted the same annual license fee from a non-resident wholesaler as from the resident wholesaler, but permitted the resident wholesaler to sell direct to retailers and others, while restricting the non-resident wholesaler to sales only to or through other wholesalers and not directly to retailers. In this case the District Court recognized and commented upon the impossibility of the State's ability to regulate liquor if it were not to have control of importation, and held that a distinction between domestic and imported liquors was wholly justifiable and not discriminatory.

Blum & Co. v. Henry, (Wis.) 3-28-36.

The Wisconsin statute under consideration in the case of *Blum v. Henry* was very similar to the Missouri statute just mentioned, in that the license fee was the same for both residents and non-residents. Such license, however, permitted the non-residents to sell only to manufacturers or wholesalers, whereas the same license permitted the residents to sell to anyone.

The District Court there immediately put the query:

> "Can it be possible that the language of the Amendment may be so ignored that Congress may still regulate interstate commerce in intoxicating liquor,—by authorizing transportation to any State, notwithstanding interdiction by the State?"

It answers its own query by stating that such contention is repugnant to the plain words of the Amendment. That Court also recognized the necessity of regulating the importation of liquor and the necessity of a distinction between "importers" and local dealers and said:

> ". . . In order to deal properly with those who traffic both from without and within the State, a classification between those two groups of traffickers cannot *prima facie* be called arbitrary or unreasonable or as not germane to the ultimate objective."

Discrimination.

California Act Does Not Discriminate Against Importers.

While it is our contention that the Twenty-first Amendment removes the mantle of the commerce clause completely from liquor in the instances where such Amendment is applicable, nevertheless, we do not concede that in the present instance any discrimination is made against importers in the California Act.

In the light of universal experience with the difficulties of handling the liquor problem, we believe that it will be conceded by all that no control over liquor traffic can be successfully exercised unless such control may effectively reach the source of all

liquor within the territory in question. With this in mind, it must be equally apparent that there are two fountain heads within the State from which liquor may spring, i. e., the local brewer or manufacturer and the importer. The State of California, recognizing these two sources of liquor, based its system upon the control of all liquor at its source by requiring that every local manufacturer or brewer should be licensed and that every importer should be licensed.

Importer and Manufacturer Are Two Fountain Heads of Liquor in State.

Section 5, subdivision 1 of the California Act (Juris. Stat. 14) fixes a beer manufacturer's license at $750.00 per year, as against a beer importer's license at $500.00 per year. The difference then in the amount of the fee discloses a discrimination of $250.00 per year, not against, but in favor of the importer. The manufacturer's license (Sec. 6, Subdivision a, Jur. Stat. 16) permits the holder to sell such beer to any properly licensed person in the State.

License Fees, Manufacturer $750, Importer $500.

The importer's license only authorizes the holder to import and export liquor and gives no right of sale. Such importer may, however, take out a wholesaler's license which then gives him the same selling privileges as the holder of a manufacturer's license has. Such wholesaler's license costs $50.00, so that now the importer with his wholesaler's license stands upon an equal footing with the manufacturer so far as privileges are

Importer With Wholesaler License Has Same Selling Privileges as Manufacturer.

concerned, and still retains an annual cash discrimination in his favor of $200.00. Inasmuch as Sec. 7 of the Act (Jur. Stat. 18) provides that every license issued shall be for one specific location only, the manufacturer and importer stand upon an equal footing in this respect.

We have then the two original sources from which spring all the liquor within the State standing upon an equal footing, except as to the amount of license fee. The manufacturer, on the one hand, produces his product at his local factory and sells the same to prescribed parties by the payment of an annual license fee of $750.00. The importer, on the other hand, produces his product from without the State and sells the same to the same prescribed parties by the payment of his $500.00 importer's license and his $50.00 wholesaler's license. The only apparent difference or discrimination, if any, exists in favor of the importer to the amount of $200.00 cash per year in the matter of the annual license fees.

Importer Placed Upon Equal Footing With Manufacturer at Cost of $200 Less.

It will be noted that Secs. 23, 25, 26 and 27 of the Act (Jur. Stat., pp. 23-38 incl.), providing for an excise tax upon all beer sold by manufacturers and importers and requiring a bond from such parties together with monthly reports, were not held invalid or unconstitutional by the lower court.

Excise Tax on Imported Beer Not Held Invalid.

It would seem that the lower court failed to draw its distinctions and comparisons as between importers and local manufacturers. Instead, in its opinion [R. 39] it speaks of this discrimination as between wholesalers of imported beer and of locally manufactured beer to the detriment of the former. As a matter of fact, there is no such distinction made by the Act. Sec. 2, subdivision(s), (Jur. Stat. p. 13) defines wholesaler as "every person other than a manufacturer or rectifier who is engaged in business as a broker, jobber, or wholesale merchant, dealing in alcoholic beverages". And, as before noted, the wholesaler's license authorizes the holder to sell to any properly licensed person. There is no distinction made as to whether such wholesaler sells and deals in locally manufactured beer or imported beer.

Lower Court Draws Comparisons Between Wholesalers of Local and of Imported Beer Instead of Between Importers and Manufacturers.

To our mind there appears to be a fallacy in the reasoning of the lower Court in that it compares the importer with the wholesaler and thus arrives at a discrimination as against the former, because of the $500.00 license fee to the importer as against the $50.00 license fee to the wholesaler. This is further apparent by the statement of the lower Court [R. 40] "that there is even less justification for making a distinction, created by the provisions of the statute here in question, between the wholesalers of beer manufactured in California and those who sell beer imported into the State, with respect to the amount charged for the privilege of selling beer". The wholesaler of beer does not stand in a position of comparison or contrast to either the manufacturer or the importer.

Importer and Local Manufacturer Both Serve to Bring Beer Into Being for First Time Within State.

The wholesaler is a mere dealer in beer which he procures from a source of original production within the State, to-wit, either a local manufacturer or an importer. The importer, on the other hand, stands in the same category as a local manufacturer, as one who first produces beer within the State. If this distinction is kept in mind the logical and equitable operation of the California Act is readily apparent.

Tax Upon Foreign Beer Not Object of Act.

It is obvious that the object of the Act under consideration is not to impose any tax upon the beer manufactured in other States while exempting that brewed within the State. The fact that of the two sources of origin within the State, the local manufacturer is charged a fee of $750.00 and the importer only $500.00, demonstrates this fact. The wholesaler can neither manufacture nor import his beer but must procure it from either a local manufacturer or an importer. His license fee is $50.00 regardless of whether he sells local or imported beer. No distinction is made and his one license permits him to sell either or both kinds.

That the lower court disregarded these facts and the plain provisions of the Act is shown by the following statement in the opinion [R. 35]:

> "It is conceded that, under this Statute, a person who engages in business as a 'wholesaler' of beer manufactured in California, pays annually only a $50.00 license tax for each establishment maintained

by him in this state for that purpose, whereas a competing 'wholesaler' of beer which he imports into this state pays a like charge, and in addition is required to pay a further license tax of $500.00 for each establishment maintained by him for the receipt and possession of such imported beer."

As we have already pointed out the foregoing statement shows what we believe to be an altogether incorrect impression of the operation of the Act. The error arises in treating the "wholesaler" and "importer" as one and the same. This is wholly at variance with the terms of the Act which throughout maintains and treats "importers" in a class by themselves wholly separate and apart from "wholesalers".

Erroneous Treatment of Importer and Wholesaler as the Same.

In the above quotation from the opinion of the lower court the wholesaler of local beer is assumed to have purchased the same from a local manufacturer, whereas the wholesaler of imported beer is assumed not to have purchased his beer from an importer but to have imported the same directly himself. In order to draw a true comparison for the purpose of determining if any discrimination exists, the same conditions must be assumed as existing in each instance. If the wholesalers in both cases desire to purchase their beer, one from a local manufacturer and the other from an importer, they each pay the same fee of $50.00 and there is no difference nor discrimination. On the contrary, if such wholesalers each desire to produce their own beer instead of purchasing the same, the wholesaler of local beer would have to manufacture his own beer and pay an additional license fee of $750.00,

True Comparison.

and the wholesaler of imported beer would have to import his own beer and pay an additional license fee of $500.00. Thus we again arrive at practically the same end heretofore stated. The only difference now is the sum of $250.00 which, if it be a discrimination, is not against the wholesaler of imported beer, but is in his favor.

Reymann Brewing Co. v. Brister.

In *Reymann Brewing Co. v. Brister,* 179 U. S. 445, 21 S. C. 201, 45 L. Ed. 69, the effect of an Ohio law was said to be that a domestic manufacturer could sell his liquor in quantities of one gallon or more at the place of manufacture and ship to any part of the state, whereas the foreign manufacturer, having no place of manufacture within the state, was obliged to pay a tax in order to sell his product. The court (page 451) held that this was not objectionable as the disadvantage did not "appear to arise out of any intention on the part of the State Legislature to make a hostile discrimination against foreign manufacturers." It stated that this might have been otherwise if the object of the law had been to impose a tax upon products of other states while exempting similar domestic goods from such taxation.

Unsupported Finding.

(Specification of Error No. 6)

The lower court found as a fact [Finding XV, R. 55]:

> "That the imposition of an importer's license at each of plaintiffs' said points of distribution and all such points of distribution belonging to others similarly situated, is a direct charge upon the beer so imported and upon the prices at which said imported beer may be sold in the State of California, and is a

discrimination and charge as against such beer so manufactured outside of the State of California and in favor of the beer manufactured within the State of California."

Such Finding is assigned as error [Assignment 9, R. 78].

The Finding is in the language of the allegation in the Bill of Complaint [R. 18, 19]. Such allegation is expressly denied by the defendants (appellants here) in their return [R. 28, 29, paragraph X and XI]. Inasmuch as this was heard by the court solely upon the Bill of Complaint and the return thereto and without any supporting affidavits or evidence [R. 31, 32, 42], we maintain that the court was wholly unwarranted in finding this as a fact. It is elementary, requiring no supporting authorities, that a finding upon a controverted issue of fact cannot be sustained in the utter absence of any evidence whatsoever in support thereof.

No Supporting Affidavit Nor Evidence Presented in Lower Court

It will be conceded that technically the amount of the importers' license fee would enter into the cost of beer imported and sold by him. However, if we are to believe the claims and allegations of plaintiffs (appellees here) as to the volume and value of the beer so imported and sold by them, the added cost of the importers' license when distributed over such beer would be so microscopically infinitesimal as to be practically unascertainable.

This finding also assumes the necessity for an importer's license at each point in the State to which such importer may desire to directly ship beer. This, however, is not a necessity but merely a convenience. The local manufacturer operating under one license is under necessity of shipping his product throughout the state from the one point of manufacture, the same as an importer operating under one license.

Several Points of Operation Result Similarly as Between Importers and Manufacturers.

If we are to maintain a parity in condition between the importer and manufacturer, we must consider both operating at a single point, or the manufacturer establishing branch plants at different points within the state the same as the importer desiring to maintain different points of import within the state, in which latter event, the manufacturer would likewise have to take out a license for each of such plants and at a cost of $250.00 greater than the importer in each instance, so that the ratio of *discrimination in the latter* event would greatly increase, not against but in favor of the importer.

Conclusion.

It is our contention that inasmuch as the State of California has enacted laws regulating the use and traffic in liquor, including the transportation and importation thereof, that the Twenty-first Amendment to the United States Constitution has removed the interstate transportation and importation of such liquor from under the protection and application of the commerce clause of such Constitution, and that the provisions of said law relating to importation of liquor do not violate nor contravene any of the provisions of the United States Constitution; and further,

that such provisions do not discriminate against such importation nor cast any burden upon interstate commerce, and do not in any manner contravene the commerce clause of the Constitution.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers and that this Court should review the decision of the said District Court of the United States for the Southern District of California, Central Division, and finally reverse it.

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WALTER L. BOWERS,
EUGENE ELSON,
Deputies Attorney General,
Counsel for Appellant.

APPENDIX.

Chronology.

August 8, 1890. The Act of Congress known as the "Wilson Act" (Sec. 121, Title 27, Cumulative Supplement, United States Annotated Code 1933, p. 102) became effective. Said Act reads as follows:

> "All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

March 1, 1913. The Act of Congress known as the "Webb-Kenyon Act" (Sec. 122, Title 27, Cumulative Supplement, United States Annotated Code 1933, p. 102) became effective Said Act reads as follows:

> "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States,

or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

March 3, 1917. The Act of Congress known as the "Reed Amendment" (Sec. 123, Title 27, Cumulative Supplement, United States Annotated Code, p. 103) became effective. Said Amendment reads as follows:

"Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal and mechanical purposes, into any State or Territory the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be fined not more than $1,000 or imprisoned not more than six months, or both: Provided, That nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State: Provided further, That the provisions of this section are made applicable to the District of Columbia."

December 5, 1933. Twenty-first Amendment to the Constitution of the United States was declared ratified and thereupon became effective, thereby repealing the Eighteenth Amendment to the Constitution of the United States. Said Amendment reads as follows:

"Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by convention in the several States, as provided in the Constitution within seven years from the date of the submission hereof to the States by the Congress."

November 6, 1934. The people of the State of California adopted an amendment to section 22, article 20 of the Constitution of the State of California which became effective on that date. Said Amendment reads as follows:

"Section 22. The State of California, subject to the Internal Revenue Laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of intoxicating liquor within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the States shall have the exclusive right and power to regulate the importation into and exportation from the State, of intoxicating liquor. Intoxicating liquors, other than beers, shall not be consumed, bought, sold, or otherwise disposed of for consumption on the premises, in any public saloon, public bar or public barroom within the State; provided, however, that subject to the aforesaid restric-

tion, all intoxicating liquors may be kept and may be bought, sold, served, consumed, and otherwise disposed of in any bona fide hotel, restaurant, cafe, cafeteria, railroad dining or club car, passenger ship, or other public eating place, or in any bona fide club after such club has been lawfully operated for not less than one year. The State Board of Equalization shall have the exclusive power to license the manufacture, importation and sale of intoxicating liquors in this State, and to collect license fees or occupation taxes on account thereof and shall have the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals. It shall be unlawful for any person other than a licensee of said board to manufacture, import or sell intoxicating liquors in this State. Until the Legislature shall otherwise provide, the privilege of keeping, buying, selling, serving, and otherwise disposing of intoxicating liquors in bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and in bona fide clubs after such clubs have been lawfully operated for not less than one year, and the privilege of keeping, buying, selling, serving, and otherwise disposing of beers on any premises open to the general public shall be licensed and regulated under the applicable provisions of the so-called State Liquor Control Act, California Statutes 1933, Chapter 658, in so far as the same are not inconsistent with the provisions hereof, and excepting that the license fee to be charged bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and any bona fide clubs after such clubs have been lawfully operated for not less than one year, for

the privilege of keeping, buying, selling, or otherwise disposing of intoxicating liquors other than beers and wines, shall be $250.00 per year, or $62.50 per quarter-annum for seasonal businesses, subject to the power of the State Board of Equalization to change such fees.

The Legislature may authorize, subject to reasonable restrictions, the sale in retail stores of liquor contained in the original packages, where such liquor is not to be consumed on the premises where sold.

The Legislature shall provide for apportioning the amounts collected for license fees or occupation taxes under the provisions hereof between the State and the cities, counties and cities and counties of the State, in such manner as the Legislature may deem proper.

All constitutional provisions and laws inconsistent with the provisions hereof are hereby repealed."

June 13, 1935. Act to license, regulate and control the manufacture, transportation, sale, purchase, possession and disposition of alcoholic beverages known as the "Alcoholic Beverage Control Act" being Senate Bill 919, chapter 330, pages 1123 to 1183, Statutes of 1935 of the State of California which was approved and became effective on that date. Said Act in part reads as follows:

"Section 2. The following words, terms and phrases when used in this act have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

. . . . . .

(c) 'Beer' means any alcoholic beverage obtained by the fermentation of any infusion or decoction of barley, malt, hops or any other similar product, or

any combination thereof in water, and shall include ale, porter, brown, stout, lager beer, small beer and strong beer but shall not include sake known as Japanese rice wine.

. . . . . .

(k) 'Importer' means every person who, in the case of alcoholic beverages brought into this State from outside of this State, is the first in possession thereof within this State after the act of importation is completed.

(s) 'Wholesaler' means and includes every person other than a manufacturer or rectifier who is engaged in business as a broker, jobber or wholesale merchant, dealing in alcoholic beverages.

Section 3. On and after July 1, 1935, no person shall perform any act or acts which would constitute such person a manufacturer, rectifier, importer, wholesaler, or retailer of any alcoholic beverage within the meaning of this act or shall package, label or sell any alcoholic beverage unless such person is authorized to do so by a license duly issued pursuant to the provisions of this act, or pursuant to the provisions of the State Liquor Control Act, Chapter 658, Statutes of 1933. Any person violating any provision of this section shall be guilty of a misdemeanor.

Section 5. The following are the types of licenses to be issued under this act and the annual fees to be charged therefor:

1. Beer manufacturer's license.....$750.00 per year

. . . . . .

8. Beer importers license..... 500.00 per year

Section 6. Except as otherwise provided in this act and subject to the provisions of section 22 of Article XX of the Constitution, the licenses provided for in the preceding section shall authorize the person to whom issued to exercise the following rights and privileges and no others at the premises for which issued during the year for which issued.

(a) Any manufacturer's license authorizes the person to whom issued to become a manufacturer of the alcoholic beverage specified in the license, to package, mix, flavor and color and label the same and to export or sell such alcoholic beverages to persons holding licenses issued by the board authorizing the sale of such alcoholic beverage; provided that a wine manufacturer's license authorizes the manufacture of grape brandy to be used exclusively for fortifying purposes by its holder on the premises for which issued.

(d) Any importer's license authorizes the person to whom issued to become an importer of alcoholic beverages specified in the license and to export such alcoholic beverage.

. . . . . .

(f) Any wholesaler's license authorizes the sale of the alcoholic beverage specified in the license only to persons holding licenses issued by the board authorizing the sale of such alcoholic beverage.

Section 7. Each license issued under this act shall be issued to a specific person, and, except in the case of licenses authorizing the sale of alcoholic beverages on trains or boats, shall be issued for a specific location, the principal address of which shall be indicated on the license. Separate licenses shall be issued for

each of the premises of any business establishment having more than one location.

. . . . . .

Each license issued under this act is separate and distinct, shall be nontransferable from one person to another, and shall be transferable from the premises for which issued only as may be permitted by the board, upon payment of a transfer fee of five dollars for each license.

Sec. 10. To obtain a license under this act application therefor, accompanied by the license fee therefor, must be made to the board upon a form prescribed by the board. The application must contain the name of the applicant, and in the case of a copartnership, the names of the individual parties, in the case of a corporation the principal officers and directors, the location of the premises for which a license is applied and such other information as the board may require to assist it in determining whether the applicant and the premises qualify for a license. The board may require that the application for any on-sale license be verified under oath and be endorsed by five freeholders or householders of the city or county in which the applicant resides or the premises are located.

Sec. 11. Upon receipt of an application for a license and the license fee the board shall make a thorough investigation to determine whether the applicant and the premises for which a license is applied qualify for a license. The board must deny an application for a license if either the applicant or the prem-

ises for which a license is applied do not qualify for a license under this act.

If an application is denied, three-fourths of the license fee paid, or an amount equal to the license fee paid less ten dollars, whichever is greater, shall be returned to the applicant and the balance shall be deposited in the alcoholic beverage control fund hereinafter created.

Sec. 49. Common or private carriers shall transport alcoholic beverages into the State only when such alcoholic beverages are to be consigned to a licensed importer. The carrier must obtain the receipt of such importer for the alcoholic beverage so transported and delivered and, if the consignee refuses to give a receipt and show his importer's license to the carrier, the carrier shall be relieved of all responsibility for delivering said alcoholic beverage. Where the consignee is not a licensed importer the carrier shall immediately notify the board at Sacramento, giving full details as to the character of shipment, point of origin, destination, and address of the consignor and consignee and within ten days such alcoholic beverage shall be summarily forfeited to the State of California and shall be turned over to the board for sale at public auction.

Every person violating the provisions of this section shall be guilty of a misdemeanor."

Outline of Constitutional and Legislative Developments in Interstate Shipments of Intoxicating Liquors and the Judicial Decisions in Connection Therewith.

(Note: We are indebted for much of this material to the brief filed by Philip Lutz, Jr., Attorney General of Indiana, in No. 1580, *Premier-Pabst Sales Co. v. McNutt,* U. S. Dist. Crt., Southern Dist. of Ind.)

I.

State's Power Prior to Federal Constitution.

"Previous to the formation of the Federal Constitution the States were sovereign in the full absolute sense of the term."

Sovereignty of State Prior to Federal Constitution.

Spooner v. McConnell, 22 Fed. Cas. #13245;

Ex Parte Guerra, 94 Vt. 1, 110 Atl. 224, 226;

American Coal Mining Co. v. Indiana, etc. Co., 268 Fed. 563, 569 (Appeal Dismissed 258 U. S. 632, 42 S. C. 273, 66 L. Ed. 801);

Thurlow v. Massachusetts, 5 Howard U. S. 504, 587, 12 L. Ed. 256.

1776. The Declaration of Independence refers to the colonies as "free and independent states".

The Colonies in States under the Confederacy repeatedly enacted and enforced their statutes controlling, regulating and prohibiting importation.

Colonial Legislation Regulating and Prohibiting Imports.

The following are a few of the numerous instances thereof:

Virginia in various statutes ranging from 1660 to 1788, prohibited the importation of horses and mares, tobacco and convicts.

Henings' Stats. at Large, Vol. I, page 271;
Vol. II, p. 18, 253, 445;
Vol. IX, p. 530;
Vol. XII, p. 668.

North Carolina enacted similar legislation in 1766. North Carolina Revised Acts, p. 353.

Maryland, likewise, as to exportation. Maryland Statutes at large, 1778.

New Hampshire in 1785. Laws of New Hampshire, Vol. IV, p. 562.

New York, 1784. Colonial Laws of N. Y. Vol. X, p. 11.

Massachusetts, 1675 to 1777. Colonial Laws of Massachusetts, pp. 219, 658.

Georgia, 1770. Colonial Records of Georgia, p. 140.

II.

The Commerce Clause of the Federal Constitution.

1789.
Art. I,
Sec. 8,
Cl. 3.

"The Congress shall have power * * * to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

1847.

THE LICENSE CASES
5 Howard (46 U. S.) 504, 586;
12 L. Ed. 256.

Statutes of Massachusetts, New Hampshire, and Rhode Island involving importations of wine from France, and the law of New Hampshire involving a barrel of gin brought from Massachusetts, all requiring a license, were upheld in these cases. Chief Justice Taney said, on page 586:

State Import License Valid Where Congress Has Made No Regulation.

"* * * as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose its interest or duty to pursue."

He added, at page 577:

"I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic or from prohibiting it altogether, if it thinks proper."

WALLING v. MICHIGAN

1885.

116 U. S. 446;
6 S. C. 454;
29 L. Ed. 676.

Walling Case Inapposite Since Wilson Act and Similar Legislation. See Delameter v. S. Dakota, 205 U. S. 93; McCormick v. Brown, 286 U. S. 131.

A license tax was imposed upon persons "soliciting or taking orders from citizens or residents of this State." (Mich.) "for liquors to be shipped into this State," etc.

The court decided that the Michigan law conflicted with the commerce clause and at page 458 said:

"In view of these authorities, especially the decisions of this court on the subject, we have no hesitation in saying that the Act of 1875, under which the prosecution against Walling was instituted, if it stood alone, without any concurrent law of Michigan imposing a like tax to that which it imposes upon those engaged in selling or soliciting the sale of liquors the produce of that State, would be repugnant to that clause of the Constitution of the United States which confers upon Congress the power to regulate commerce among the several States."

III.

Development of Original Package Doctrine.

1887.

BOWMAN v. CHICAGO, ETC. RAILWAY CO.
125 U. S. 465;
8 S. C. 689;
31 Law. Ed. 700.

Original Package Doctrine Applied to Liquors.

Plaintiff sought damages from the defendant carrier for refusing to accept shipments of certain beer from Chicago to Marshalltown, Iowa, as being a violation of the commerce clause. Defendant justified this action under the Iowa statute prohibiting such transportation.

Chief Justice Field in his concurring opinion made a statement of the law (subsequently approved in *Leisy v. Hardin,* 135 U. S. at p. 119) in the *Bowman* case at page 507, as follows:

State Right to Regulate Importation of Liquors Denied.

"* * * where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulation as to interstate commerce with reference to any particular subject, is taken as a declaration that the importation of that article into the State shall be unrestricted."

In the same case in the main opinion the court at page 499 stated:

Right to Sell Imported Liquors Indicated But Not Decided.

"It is easier to think that the right of importation from abroad, and of transportation from one State of another, includes, by necessary implication, the right of the importer to sell in unbroken packages at the place where the transit terminates; for the very purpose and motive of that branch of commerce which consists in transportation, is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported. Such, indeed, was the point decided in the case of Brown v. Maryland, 12 Wheat 418, as to foreign commerce, with the express statement of Chief Justice Marshall, that the conclusion would be the same in a case of commerce among the States. But it is not necessary now to express any opinion upon the point, because that question does not arise in the present case. The precise line which divides the transaction, insofar as it belongs to foreign or interstate commerce, from the internal and domestic commerce of the State, we are not now called upon to delineate."

1889.

LEISY v. HARDIN
135 U. S. 100;
10 S. C. 681;
34 Law. Ed. 128.

Plaintiff claimed protection under the commerce law, asserting that the Iowa statutes authorizing the seizure of original packages of liquor shipped in interstate commerce to the plaintiff from Peoria, Ill., was void.

The court, citing *Gibbons v. Ogden,* 9 Wheat 1, and *Brown v. Maryland,* 12 Wheat 419, said of the power of Congress to regulate commerce, at page 108:

> "It is coextensive with the subject upon which it acts and cannot be stopped at the external boundary of a State, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered.
>
> And while, by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health and comfort of persons, and the protection of property so situated, yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the state, unless placed there by congressional action."

Court's Suggestion That Removal of Interstate Commerce Protection From Liquor Lay With Congress.

Continuing, at page 109, the court stated:

> "Yet, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States to do so, it thereby indicates its will that such commerce shall be free and untrammeled."

Referring to the *Bowman* case, *supra,* the court, at page 124, said:

Theory of Bowman Case Extended to Afford Protection of Commerce Clause to Sale of Imported Liquor.

"Under our decision in Bowman v. Chicago, etc. Ry. Co., supra, they had the right to import this beer into that State, and in the view which we have expressed, they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of Congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer."

IV.

Congressional History of Wilson Bill.

1889.

Public sentiment in this country, constantly aware of the vicious dangers inherent in all intoxicating liquors, and ever alert to guard against the persistent attempts to evade local regulation of the liquor traffic, responded instantly to this invitation of the court to seek protection from Congress. As the direct result of this unqualified ruling in the *Leisy* case, and immediately thereafter, on December 4, 1889, Senate Bill No. 398 was introduced into the United States Senate by Senator Wilson to enable Congress to take advantage of the decision of Chief Justice Fuller in *Leisy v. Hardin,* "referring to the absence of legislation on the part of congress * * * allowing the States" to deal with imported liquors.

1889. Dec. 4.

ORIGINAL FORM OF INTRODUCTION OF WILSON BILL.

"That no state shall be held to be limited or re-restrained in its power to prohibit, regulate, control, or tax the sale, keeping for sale, or the transportation as an article of commerce or otherwise, to be delivered within its own limits, of any fermented, distilled, or other intoxicating liquids or liquors by reason of the fact that the same have been imported into such State from beyond its limits, whether there shall or shall not have been paid thereon any tax, duty, import, or excise to the United States."

Vol. 21, Congressional Record, page 534.

Congressional Debate. Senator Hiscock.

Senator Hiscock immediately called attention to the fact that the Wilson Bill "may be invoked by the Legislature of a State, not for that purpose, but for the purpose of protecting the industries, the distillers, of their own State, the brewers of their own State, the wine-makers of their own State, against those of others, and who doubts it or denies it."

Vol. 21, Congressional Record, page 5090.

Senator Hoar.

Senator Hoar, a great constitutional lawyer, replied to Senator Hiscock (pp. 5090-5091, Vol. 21, Congressional Record,), in part, as follows:

"The senator says that he finds the vice in this bill that it will leave the States of the Union free to undertake to regulate or control the traffic in intoxicating liquors for the purpose of protecting their own industries against the competition of other States or other nations."

Senator Hoar then proposed a provision in the clause reading:

> "provided that such prohibition, regulation, control, or tax, shall apply equally to all articles of the same character wherever produced."

Senator Graves (Vol. 21, Congressional Record, p. 5336), Senator Faulkner (Cong. Rec., Vol. 21, p. 5378), Senator Edmonds (Vol. 21, Cong. Rec. p. 5378), proposed numerous amendments to the Wilson Bill in different language but to the same effect, of limiting the power of the State in the regulation made, so that they would be the same as "affecting or applicable to all other like property."

Senator Wilson.

Senator Wilson also proposed an amendment to prevent such discrimination. (Vol. 21, Cong. Rec. p. 5324.)

A committee amendment was passed determining the final form of the Wilson Act (Vol. 21, Cong. Rec. p. 7427), containing express provisions against discrimination, as appears in the language of the statute ultimately enacted.

1890.

THE WILSON ACT.

Aug. 8.

"An act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases.

All fermented, distilled, or other intoxicating liquors or liquids, transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same

extent and to the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Express Provision Against Discrimination.

Congress thus determined that it was necessary to place an express inhibition in the Wilson Act, since otherwise a State could constitutionally enact legislation regulating or prohibiting the importation of out-of-state liquors, to the advantage of its own products, and Congress made a deliberate choice of language from among various proposed amendments, and selected the language to prevent discrimination, to which the Supreme Court later referred in the *Scott v. Donald* case, namely:

> "To the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory."

V.

Decisions Under the Wilson Act.

1891. IN RE RAHRER
140 U. S. 545;
11 S. C. 865;
35 L. Ed. 572.

Rahrer was arrested for violation of a Kansas law prohibiting the sale or barter in any form of intoxicating liquors without first having procured a druggist's permit therefor, because, acting as an agent for a Missouri brewer, he had offered and sold one pint of whiskey in the original package as imported from Missouri into Kansas.

The court determined that the Wilson Act was constitutional, and referring to the *Bowman* and *Leisy* cases said, at page 559:

"The laws of Iowa under consideration in Bowman v. Railway Company, 125 U. S. 465, and Leisy v. Hardin, 135 U. S. 100, were enacted in the exercise of the police power of the State, and not at all as regulations of commerce with foreign nations and among the States, but as they inhibited the receipt of an imported commodity, or its disposition before it had ceased to become an article of trade between one State and another, or another country and this, they amounted in effect to a regulation of such commerce. Hence, it was held that inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character and must be governed by a uniform system, so long as Congress did not pass any law to regulate it specifically, or in such way as to allow the laws of the State to operate upon it, Congress thereby indicated its will that such commerce should be free and untrammeled, and therefore that the laws of Iowa, referred to, were inoperative insofar as they amounted to regulations of foreign or interstate commerce, in inhibiting the reception of such articles within the State, or their sale upon arrival, in the form in which they were imported there from a foreign country or another State. It followed as a corollary, that when Congress acted at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured.

Freedom of Interstate Transportation as Declared in Bowman and Leisy Cases Contrasted With Change Made by Wilson Act.

Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a State,

fall within the category of domestic articles of a similar nature. Is the law open to constitutional objection?"

And on page 562 the court remarks:

Congress May Remove Interstate Commerce Character From Liquor.

"No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."

1896.

SCOTT v. DONALD
165 U. S. 58;
17 S. C. 265;
41 L. Ed. 632.

The South Carolina Dispensary Act favored the purchase of liquor produced within the State and discriminated against outside liquors by forbidding importation except through certain State functionaries, "and thus those citizens who wish to use foreign wines and liquors are deprived of the exercise of their own judgment and taste in the selection of commodities."

This Is Not Authority for Claim That Wilson Act Applies Only to Prohibition States. See Vance v. Vandercook Co., 170 U. S. 438.,

The Court cheerfully conceded "that the law in question was passed in the bona fide exercise of the police power."

It was further stated that the South Carolina statute was "not a law purporting to forbid the importation, manufacture, sale and use of intoxicating liquors as articles detrimental to the welfare of the State and to the health of the inhabitants, hence it is not within the scope and operation of the (Wilson Act)."

Referring directly to the Wilson Act and its language, at page 100 the Court stated:

Wilson Act Held Not to Permit Discrimination Against Imported Liquor When Prohibition Is Not in Effect.

"That law was not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce. When that law provided 'that all fermented, distilled or intoxicating liquors transported into any State or Territory, remaining therein for use, consumption, sale or storage therein, should, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and should not be exempt therefrom by reason of being introduced therein in original packages or otherwise,' evidently equality or uniformity of treatment under state laws was intended. * * * But the State cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful."

While these decisions unqualifiedly hold that in the local regulation of liquor there can be no discrimination against imports, it seems apparent from the expressions of the Court that this is based entirely upon the language of the Act that such liquors so imported shall

"be subject to the operations and effect of the laws of such State * * * to the same extent and in the same manner as though such liquids or liquor had been produced in such State or Territory."

Theory That States Would Have Had Power to Discriminate Against Imported Liquor If Wilson Act Had Not Expressly Forbidden.

This language of the Court taken in connection with the debate in Congress on the Wilson bill and the amendments made in the course of its passage clearly indicate that the States would have had the power to discriminate against imports if Congress had not taken care to prevent the same by the express provision in the Act.

1898.

VANCE v. VANDERCOOK CO.
170 U. S. 438;
18 S. C. 674;
42 L. Ed. 1100.

As a result of the decision in *Scott v. Donald,* the South Carolina legislature amended its Dispensary Act, eliminating those clauses in the previous statute which had been held to operate as a discrimination, and the amended act permitted shipments to be made from outside States to residents of South Carolina for their own use, but subjected the exercise of such right to certain regulations and restrictions. This amended act was before the Supreme Court again almost immediately when non-residents claimed the right to ship liquor into the State free from any restriction whatsoever. Speaking of the claim that interstate commerce protected the imported liquor until after its sale in the original package, the Court stated that this was no longer applicable to intoxicating liquors (page 445):

"* * * Since Congress in the exercise of its lawful authority has recognized the power of the several States to control the incidental right of sale in the original packages, of intoxicating liquors, shipped into one State from another, so as to enable the States to prevent the exercise by the receiver of the accessory right of selling intoxicating liquors in original packages, except in conformity to lawful state regulations. In other words, by virtue of the act of Congress (Wilson Act) the receiver of intoxicating liquors in one State, sent from another, can no longer assert a right to sell in defiance of the state law in the original packages, because Congress has recognized to the contrary."

State May Prevent Sale of Imported Liquor in Original Package.

The claim that the Wilson Act applied only to States that prohibited and not to those that regulated the liquor traffic was directly refuted (p. 447):

"But the premise upon which these arguments rest is purely arbitrary and imaginary. From the fact that the state laws permit the sale of liquor, subject to particular restrictions, and only upon enumerated conditions, it does not follow that the law is not a manifestation of the police power of the State. The plain purpose of the act of Congress having been to allow state regulations to operate upon the sale of original packages of intoxicants coming from other States, it would destroy its obvious meaning to construe it as permitting the state laws to attach to and control the sale only in case the States absolutely forbade sales of liquor and not to apply in case the States determined to restrict or regulate the same."

Wilson Act Applies Where State Regulates Liquor Traffic as Well as Where State Absolutely Prohibits Same.

That the decision in *Scott v. Donald* was not to this effect was also plainly stated at page 448:

Scott v. Donald Not Authority That Wilson Act Applies Only to Prohibition States.

"Nor is the claim well founded that it was decided in Scott v. Donald that the provisions of the act of Congress of 1890 do not apply in any State by whose laws the sale of liquor is not absolutely forbidden, that is to say, that the right exists to sell original packages in violation of the State laws wherever they do not prohibit liquor from being sold under any circumstances."

1898.

RHODES v. IOWA
170 U. S. 412;
18 S. C. 664;
42 L. Ed. 1088.

Liquor shipped into Iowa was seized while the original package was in the carrier's hands, and its agent was prosecuted for violating the Iowa statute by moving it.

"The sole question presented for consideration is whether the statute of the State of Iowa can be held to apply to the box in question while it was in transit. * * *." (p. 414.)

Referring to the *Bowman* case, it is stated at page 419:

Comment on Bowman and Leisy Cases.

"The fundamental right which the decision in the Bowman case held to be protected from the operation of state laws by the Constitution of the United States was the continuity of shipment of goods coming from one State into another. * * *. This protection of the Constitution of the United States is plainly denied by the statute now under review, * * *."

The word "arrival" in the Act is held not to apply at the instant the package crosses the state line, but only when it comes to rest at the end of such transportation. And at page 423 the Court states:

Wilson Act Intended to Allow State Regulation to Attach Before Any Sale, But Only After Consummation of Shipment.

"Light is thrown upon the purpose and spirit of the act by another consideration. The Bowman case was decided in 1888, the opinion in Leisy v. Hardin was announced in April, 1890, the act under consideration was approved August 8, 1890. Considering these dates, it is reasonable to infer that the provisions of the act were intended by Congress to cause the legislative authority of the respective States to attach to intoxicating liquors coming into the States by an interstate shipment, only after the consummation of the shipment, but before the sale of the merchandise, * * *.

"While it is true that the right to sell free from state interference interstate commerce merchandise was held in Leisy v. Hardin to be an essential incident to the interstate commerce, it was yet but an incident, as the contract of sale within a State in its nature was usually subject to the control of the legislative authority of the State. * * * The purpose of Congress to submit the incidental power to sell to the dominion of state authority should not without the clearest implication be held to imply the purpose of subjecting to state laws a contract which in its very object and nature was not susceptible of such regulation even if the constitutional right to do so existed, as to which no opinion is expressed." (p. 424.)

1900. REYMANN BREWING CO. v. BRISTER
179 U. S. 445;
21 S. C. 201;
45 L. Ed. 269.

The Dow law taxed "trafficking in liquors" but not the manufacture nor sale of the same, and this law was construed to apply likewise to any liquors shipped into Ohio. The Court at pages 454 and 455 said:

> "And, of course, it is obvious that such liquors, sold and delivered within the State of Ohio, are within the provisions of the statute of the United States, known as the Wilson law, * * *.
>
> "As this statute, the Wilson Act, subjects intoxicating liquors imported into a State to the operation and effect of the laws of such State only when enacted in the exercise of its police powers, it is contended that such is not the character of the Dow law; that, as it contains no prohibition upon the manufacture or sale of intoxicating liquors, and only purports to regulate the trafficking therein, it is not a police measure * * *

Wilson Act Subjects Imported Liquor to State Regulation as Well as to Prohibition.

> "A similar contention was disposed of by this court in the case of Vance v. Vandercook Co., 170 U. S. 438, 447, * * *."

1904. AMERICAN EXPRESS CO. v. IOWA
196 U. S. 133;
25 S. C. 182;
49 L. Ed. 417.

Speaking of the holding in the *Bowman* and *Leisy* cases that a state law regarding intoxicating liquors could not

be made to apply to shipments from out of such State because of the federal commerce laws, the Court said at page 142:

> "In Rhodes v. Iowa, 170 U. S. 412, the same doctrine was reiterated, except that it was qualified to the extent called for by the provisions of the act of Congress * * * commonly called the Wilson Act."

Speaking further of the Rhodes case at page 142, it was said:

> "The court declined to express an opinion as to the authority of Congress under its power to regulate commerce, to delegate to the State the right to forbid the transportation of merchandise from one State to another. It was, however, decided that the Wilson Act manifested no attempt on the part of Congress to exert such power, but was only a regulation of commerce, since it merely provided, in the case of intoxicating liquors, that such merchandise, when transported from one State to another, should lose its character as interstate commerce upon completion of delivery under the contract of interstate shipment, and before sale in the original packages."

Liquor Loses Interstate Commerce Character Immediately Upon Delivery to Consignee.

1905.

PABST BREWING CO. v. CRENSHAW
198 U. S. 17;
25 S. C. 552;
49 L. Ed. 925.

A Missouri statute required that all beer and malt liquors, other than those manufactured in the State,

should be inspected by state officials, for which services an inspection fee was imposed, the same as upon the manufacture of beer and malt liquors in the State. It was contended that this was repugnant to the commerce clause, because in this particular it discriminated in favor of beer manufactured in Missouri over that imported from other States. At page 27 the Court said:

> "The purpose of the Wilson Act was to make liquor after its arrival a domestic product, and to confer power upon the States to deal with it accordingly. The police power is hence to be measured by the right of a State to control or regulate domestic products, a state and not a Federal question as respects the commerce clause of the Constitution."

Purpose of Wilson Act.

Referring once more to the claim that the Act applied only to prohibition and not regulation, the court said at page 29:

> "If the purpose of the Act had been to allow the state law to govern the sale of the original package only where the sales of all liquor were forbidden, this object could have found ready expression, whilst, on the contrary, the entire context of the act manifests the purpose of Congress to give to the respective States full legislative authority, both for the purpose of prohibition, as well as for that of regulation and restriction with reference to the sale in original packages * * * brought * * * in from other States."

The argument was made that (page 30):

Fact That State Regulations Are Burden on Interstate Commerce Does Not Render Such State Liquor Regulation Invalid.

"As the burdens which the statute impose were of such character as to affect traffic in the articles and hence operate to deter shipments into Missouri, therefore the statute must be treated as if it bore upon the liquor while still in transit as a subject of interstate commerce."

The Court answered this contention by stating, on the same page:

"This proposition simply amounts to contending that the Wilson Act should be disregarded, since to enforce it would give the State power to regulate interstate traffic in liquor. If when a State has but exerted the power lawfully conferred upon it by the Act of Congress, its action becomes void as an interference with interstate commerce because of the reflex or indirect influence arising from the exercise of the lawful authority, the result would be that a State might exert its power to control or regulate liquor, yet if it did so its action would amount to a regulation of commerce and be void. And this would be but to say at one and the same time that the power could and could not be exercised. But the proposition would have a much more serious result, since to uphold it would overthrow the distinction between direct and indirect burdens upon interstate commerce by means of which the harmonious workings of our constitutional system has been made possible."

1906.

DELAMETER v. SOUTH DAKOTA
205 U. S. 93;
27 S. C. 447;
51 L. Ed. 724.

The laws of South Dakota "imposed an annual license charge 'upon the business of selling or offering for sale' within the State 'by any travelling salesman who solicits orders by the jug or bottle in lots less than five gallons'." Delameter, who had taken out no license, solicited orders for shipment into the State in violation of this law, and was prosecuted under its criminal provision. At page 98 the Court said:

> "We are hence called upon only to consider whether the general power of the State to control and regulate the liquor traffic and the business of dealing and soliciting proposals for the dealing in the same within the State was inoperative as to the particular dealings here in question, because they were interstate commerce, and therefore could not be subjected to the sway of the state statute without causing that statute to be repugnant to the commerce clause of the Constitution of the United States."

Continuing on the same page the Court stated:

> "It is settled by a line of decisions of this court, noted in the margin, that the purpose of the Wilson Act, as a regulation by Congress of interstate commerce, was to allow the State, as to intoxicating liquors, when the subject of such commerce, to exert ampler power than could have been exercised before the enactment of the statute. In other words, that Congress, sedulous to prevent its exclusive right to regulate commerce from interfering with

Contrast With Ruling in Walling v. Michigan and Leisy v. Hardin Decided Prior to Wilson Act.

the power of the States over intoxicating liquors, by the Wilson Act adopted a special rule enabling the States to extend their authority to such liquor shipped from other States before it became commingled with the mass of other property in the State by a sale in the original package."

Referring directly to the Wilson Act, the Court at page 99 said:

"That Act, as we have seen, manifested the conviction of Congress that control by the States over the traffic of dealing in liquor within their borders was of such importance that it was wise to adopt a special regulation of interstate commerce on the subject. When, then, for the carrying out of this purpose the regulation expressly provided that intoxicating liquors coming into a State should be as completely under the control of a State as if the liquor had been manufactured therein, it would become, we think, a disregard of the purposes of Congress to hold that the owner of intoxicating liquors in one State can, by virtue of the commerce clause, go himself or send his agent to such other State, there in defiance of the laws of the State to carry on the business of soliciting proposals for the purchase of intoxicating liquors."

Importance of State Liquor Regulation Recognized.

Defiance of State Liquor Regulation Denounced.

Replying to the contention that the Wilson Act attached only after the liquor came to rest within the State and therefore could not apply to the solicitation for orders of liquor which were still without the State, the Court at page 101 said:

"But, as by the Wilson Act, the power of South Dakota attached to intoxicating liquors, when shipped into that State from another State, after delivery but before the sale in the original packages, so as to authorize South Dakota to regulate or forbid such sale, it follows that the regulation by South Dakota of the business carried on within its borders of soliciting proposals to purchase intoxicating liquors, though such liquors were situated in other States, cannot be held to be repugnant to the commerce clause of the Constitution, because directly or indirectly burdening the right to sell in South Dakota, a right which by virtue of the Wilson Act did not exist."

Solicitation of Liquor Orders for Importation Contrary to State Regulation; Punishable Under Wilson Act.

1907

PHILLIPS v. CITY OF MOBILE
208 U. S. 472;
28 S. C. 370;
52 L. Ed. 578.

This case did not involve any discrimination against imported liquors, but Phillips contended that the license tax imposed by the ordinance upon sellers of intoxicating liquors was invalid so far as imported liquors were concerned, because the latter could not be taxed in their original packages even under the Wilson Act. The Court replied to this, and said at page 478:

"It is insisted that Congress by the passing of the Wilson Act, merely removed the impediment to the State reaching the interstate liquor through the police power, and that it intended to, and did, keep in existence any other impediment to State interference with interstate commerce in original packages.

"But we are of opinion that this section of the ordinance was clearly an exercise of the police power of the State, and as such authorized by the act of Congress."

And continuing on page 479, it is said:

"The sale of liquors is confessedly a subject of police regulation. Such sale may be absolutely prohibited, or the business may be controlled and regulated by the imposition of license taxes, by which those only who obtain licenses are permitted to engage in it. Taxation is frequently the very best and most practical means of regulating this kind of business. The higher the license, it is sometimes said, the better the regulation, as the effect of a high license is to keep out from the business those who are undesirable and to keep within reasonable limits the number of those who may engage in it."

High License Taxes Sustained As Proper Regulation.

1908. ADAMS EXPRESS CO. v. KENTUCKY
214 U. S. 218;
29 S. C. 633;
53 L. Ed. 972.

This case merely reiterated the ruling that the Wilson Act did not attach to an interstate commerce shipment while the merchandise was in transit and until after its arrival and delivery to the consignee, and therefore the express company could not be prosecuted for delivering liquor from Tennessee to a consignee in Kentucky in violation of a statute of the latter State. No appearance was made in behalf of the State in defense of its statute.

1912.

L. & N. R. R. Co. *v.* F. W. Cook Brewing Co.
223 U. S. 70.
32 S. C. 189;
56 L. Ed. 355.

The Kentucky statute provided that it should be unlawful for any common carrier to transport intoxicating liquor to any consignee in a prohibited local option district. This was merely another example of the ineffectiveness of the Wilson Act to remove the protection of the commerce clause from the prohibited liquor prior to its delivery to the consignee, and the Court held that the railroad company was obligated to transport the liquor into the local option territory regardless of the statute.

1912.

DeBary & Co. v. Louisiana
227 U. S. 108;
33 S. C. 239;
57 L. Ed. 441.

State License on Sale of Imported Liquor Held Valid.

DeBary attacked a state license requirement for engaging "in the business of disposing of alcoholic liquor in less quantities than five gallons." It was conceded that he was engaged only in selling imported liquors in their original packages.

The contention that the Wilson Act referred only to interstate and not foreign commerce was adversely disposed of. Referring to the expression "all liquors" used in the Wilson Act, the court at page 110 said:

> "The word 'all' causes a consideration of the point of origin of the liquors transported to be wholly negligible, and this irresistible conclusion as to the meaning of the text is rendered, if possible, clearer by consideration of the intent of Congress in enacting the Wilson law."

VI.

Congressional History of the Webb-Kenyon Act.

1913. The effect of these decisions, disclosing that the Wilson Act did not completely prohibit importation of liquor contrary to state regulation thereof, and a realization of the opportunities thus afforded unscrupulous persons to evade local liquor regulations, with the resultant growing public conviction that it was an abuse of the interstate commerce privilege to thus allow this means of frustrating the people's wishes, again forced this problem upon the attention of Congress and resulted in the Webb-Kenyon Act.

As reported by the Senate Committee, this legislation (Senate Bill 4043) contained a second section and read as follows:

> "Sec. 1. That the shipment or transportation in any manner or by any means whatsoever of any spirituous, vinous, malted, fermented or other intoxicating liquor of any kind, including beer, ale, or wine, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor, is intended, by any person interested therein, directly or indirectly, or in any manner connected with the transaction, to be received, possessed, or kept, or in any manner used, either in the original package or otherwise, in violation of any law of such

State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, enacted in the exercise of the police powers of such State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, is hereby prohibited.

"Sec. 2. That all fermented distilled, or other intoxicating liquors, or liquids, transported into any State or Territory, or remaining therein, for use, consumption, sale or storage therein, shall, upon arrival within the boundaries of such State or Territory and before delivery to the consignee, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its reserved police powers, to the same extent and in the same manner as if such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced in original packages or otherwise." (Vol. 49, Congressional Record, p. 2687.)

Precisely Same Language as Contained in Wilson Act Against Discrimination.

This section 2 was specifically designed to prevent the State from discriminating against importation of out-of-state liquors, and exactly the same language previously enacted in the Wilson Act was employed in this second section for that purpose.

However, Congress refused to limit the terms of the Webb-Kenyon Act, as it had previously limited the terms of the Wilson Act.

Final Form of Statute Eliminates All Restrictions Against Discrimination.

This bill in final form as passed by the Senate, Vol. 49, Congressional Record, p. 4924, eliminated entirely this section two and all restrictions against discrimination.

THE WEBB-KENYON ACT.

1913. Mar. 1. "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, is hereby prohibited."

The history of the Webb-Kenyon Act and the Wilson Bill, therefore, offers a striking contrast. The Wilson Bill as originally introduced contained no savings clause or reservation preventing discrimination against imported liquors, but was amended so as to expressly forbid such discrimination and to compel the State to treat imported liquors the same as those products produced within their own borders. On the contrary, the Webb-Kenyon Act began its legislative life with a second section repeating this prohibitive language of the Wilson Act on discrimination, but such section was expressly rejected, and the Webb-Kenyon Act was enacted without any such reservation or prohibition.

Striking Contrast in History of Webb-Kenyon and Wilson Acts as to Discrimination.

The presence of such second section in the original draft and its elimination before final passage, after debate, definitely show the purpose of Congress to leave the States free to discriminate, if they so desire, which is further shown by the arguments which occurred in the United States Senate regarding this section two.

Congressional Comments.

In the remarks by Senator Borah of Idaho, found on page 702, of Vol. 49 of the Congresisonal Record, we find this significant language:

Senator Borah.

"The prohibition which has been made in the preceding section is, in a sense, abrogated in the second, and liquor is recognized as an article of commerce. Recognizing it as an article of commerce, and one which may go into the state, then the question is, can you stop it and turn it over to the state before it is finally delivered to the consignee? In the first section you make it a contraband of commerce when it is being shipped for unlawful use. In the second you recognize it as an article of commerce, but turn it over to the state before it is delivered to the consignee. I do not think this aids the law in its efficiency, and I believe it is unconstitutional."

Senator Kenyon.

Senator Kenyon, one of the co-authors of the bill, in speaking of the effect of section two as contained in the original draft, said on page 830, Vol. 49 of the Congressional Record:

"The first section takes certain liquor out of commerce, and the second section seems to recognize it as being in. There is some incongruity in this."

It is to be noted that the Webb-Kenyon Act was passed in the face of a veto message by President Taft distinctly informing Congress that the effect of the Webb-Kenyon bill, if constitutional, was "to permit the States to exercise their old authority, before they became States, to interfere with commerce between them and their neighbors." (Vol. 49, Congressional Record, p. 4292.)

President Taft's Veto Message.

In the veto message of President Taft, shown on page 4291, Vol. 49 of the Congressional Record, dated February 28, 1913, the President quotes with approval the opinion of George W. Wickersham, Attorney General of the United States upon the subject of the Webb-Kenyon bill.

Attorney-General Wickersham's Opinion.

On page 4296 of this volume, Attorney General Wickersham, in his communication to the President, used this language:

> "The proposition * * * can only be conceded if it be held that Congress can abrogate entirely its power over interstate commerce in an article which it does not itself declare to be 'an outlaw of commerce', but which it leaves to the varying legislation of the respective States to more or less endow with qualities of outlawry. Without prolonging this discussion * * * I am compelled to the conclusion * * * that unless the Supreme Court shall recede from a well settled line of decisions extending over a long period of years, it would most certainly declare this legislation to be without the constitutional powers of Congress."

VII.

Decisions Under Webb-Kenyon Act.

1914. ROSSI v. PENNSYLVANIA
238 U. S. 62;
35 S. C. 677;
59 L. Ed. 1201.

This case, while decided after the passage of the Webb-Kenyon Act, cannot be considered as throwing any light thereon, for the court, at page 66 said:

> "The case arose before the passage of the act of March 1, 1913, known as the Webb-Kenyon Act * * * and the effect of this legislation is therefore not now involved."

1915. ADAMS EXPRESS CO. v. KENTUCKY
238 U. S. 190;
35 S. C. 824;
59 L. Ed. 1267.

The Adams Express Co. was indicted for violation of a statute of the State of Kentucky for delivering intoxicating liquors from Tennessee to certain consignees in Kentucky for their personal use contrary to the said statute.

This statute was before the same Court in the *Louisville & National R. R.* case, 223 U. S. 70, where it was held that the statute was void as an interference with interstate commerce and not within the protection of the Wilson Act because the latter did not attach until after the transportation had been completed by delivery to the consignee. At page 197 the court stated:

> "After the decision of Leisy v. Hardin, Congress passed the Wilson Act in 1890, 26 Stat. 313. That

act made intoxicating liquors transported in interstate commerce subject to the exercise of the police power of the State upon arrival in the State, in the same manner as though such liquors had been produced in the State or Territory into which the same were shipped."

Continuing on page 198 the court further stated:

Purpose of Webb-Kenyon Act to Remove Whatever Protection of Interstate Commerce Over Liquor Importations Remained Under Wilson Act.

"From what we have said, it follows that, before the passage of the Webb-Kenyon Act, while the State in the exercise of its police power might regulate the liquor traffic after the delivery of the liquor transported in interstate commerce, there was nothing in the Wilson Act which prevents shipment of liquor in interstate commerce for the use of the consignee, provided he did not undertake to sell it in violation of the laws of the State. The history of the Webb-Kenyon Act shows that Congress deemed this situation one requiring further legislation upon its part, and thereupon undertook, in the passage of that act, to deal further with the subject, and to extend the prohibition against the introduction of liquors into the State by means of interstate commerce. That the act did not assume to deal with all interstate commerce shipments of intoxicating liquor into prohibitory territory in the States is shown in its title, which expresses the purpose to divest intoxicating liquors of their interstate character in certain cases. What such cases should be was left to the text of the act to develop."

The Court then proceeds to quote some of the language of the act and concludes therefrom that Congress plainly indicated its purpose not to prohibit all interstate shipments

of liquor into dry territory, but to render the statute operative only when the liquor is to be dealt with in violation of the local law of the State, saying at page 199:

> "Such shipments are prohibited only when such person interested intends that they shall be possessed, sold, or used in violation of any law of the State wherein they are received. Thus far and no further has Congress seen fit to extend the prohibition of the act in relation to interstate shipments. Except as affected by the Wilson Act, which permits the state law to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon Act, which prohibits the transportation of liquors into the State to be dealt with therein in violation of local law, the subject matter of such interstate shipments is left untouched and remains within the sole jurisdiction of Congress under the federal constitution."

Apparent Holding That Webb-Kenyon Act Only Applies When Liquor Is to Be Used in Violation of Local Law Is Refuted in Clark Distilling Co. v. Western etc. Ry., 242 U. S. 311.

The Court then goes on to hold, page 202:

> "It therefore follows that, inasmuch as the facts of this case show that the liquor was not to be used in violation of the laws of the State of Kentucky, as said laws are construed by the highest court of that State, the Webb-Kenyon law has no application and no effect to change the general rule that the States may not regulate commerce wholly interstate."

It might seem to be, and this case has been cited in various instances as authority for the proposition that the Webb-Kenyon Act did not prevent the shipment of liquor into a State in violation of its rules and regulations, provided that the State did not make the use thereof unlawful. This, however, is completely refuted in the following case.

1917. JAMES CLARK DISTILLING CO. v. WESTERN MARYLAND RY. CO.
242 U. S. 311;
61 L. Ed. 26;
37 S. C. 180;
L. R. A. 1917B, 1218;
Anno. Cases 1917B, 845.

West Virginia prohibited the manufacture, sale, keeping or storing for sale of intoxicating liquor except by druggists for medicinal, sacramental, scientific, and manufacturing purposes; but there was no express prohibition against the individual right to use intoxicants. The statute further contained a provision that every delivery of liquor in the State by a common carrier should be considered as a consummation of a sale made at the point of delivery in the State. After stating that there can be no doubt that this statute did not offend the due process clause of the Fourteenth Amendment, the Court at page 320 said:

"But that it was a direct burden upon interstate commerce and conflicted with the power of Congress to regulate commerce among the several States, and therefore could not be used to prevent interstate shipments from Maryland into West Virginia, has not been open to question since the decision in Leisy v. Hardin, 135 U. S. 100. And this brings us to consider whether the Webb-Kenyon law has so regulated interstate commerce as to give the State the power to do what it did in enacting the prohibition law and cause its provisions to be applicable to shipments of intoxicants in interstate commerce, thus saving that law from repugnancy to the Constitution of the United States, which is the third proposition for consideration."

Does Webb-Kenyon Act Enable States to Regulate Liquor Traffic and Make Its Regulations Enforceable Against Interstate Shipments?

Replying to the contention that the Webb-Kenyon law "was only intended to include State prohibitions in so far as they forbade the shipment, receipt and possession of liquor for a forbidden use," and where such shipment, receipt, and possession, for individual use was not expressly forbidden, the law did not apply, the Court at page 322 said:

> "This is sought to be supported by the historical environment of the Webb-Kenyon Act as evidenced by the debate on its passage and by a decision of this court as well as decisions of state courts which it is insisted have so construed that act."

But the Court at page 323 stated:

> "The antecedent of the Webb-Kenyon Act, that is, its legislative and judicial progenitors, leave no room for the contention made. To correct the great evil which was asserted to arise from the right to ship liquor into a State through the channels of interstate commerce and there receive and sell the same in the original package in violation of State prohibitions, was indisputably the purpose which led to the enactment of the Wilson Law forbidding the sale of liquor in a State in the original package even although brought in through interstate commerce when the existing or future State laws forbade sales of intoxicants. * * * At the same time it was recognized, however, that as the right to receive liquor was not affected by the Wilson Act, such receipt and the possession following from it and the resulting right to use remained protected by the commerce clause even in a State where what is known as the dispensary system prevailed. Vance v. Vandercook Company, 170 U. S. 438. Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson

Purpose of Wilson Act.

Purpose of Webb-Kenyon Act to Prevent Immunity of Interstate Commerce from Allowing Liquor to Be Shipped Into States Contrary to Their Regulations.

Act and the decisions of this court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling irrespective of whether the state law did or did not prohibit the individual use of liquor. That such also was the embodied spirit of the Webb-Kenyon Act plainly appears since if that be not true, the coming into being of the act is wholly inexplicable"

Referring then to the *Adams Express Company* case, *supra*, and limiting clearly the extent of that decision, the Court on page 324 said:

Authority of Adams Express Co. v. Kentucky, 238 U. S. 190, Expressly Limited.

"The case in this court relied upon to establish the contrary (Adams Express Company v. Kentucky, 238 U. S. 190) clearly does not do so. All that was decided in that case was that as the court of last resort of Kentucky into which liquor had been shipped had held that the state statute did not forbid shipment and receipt of liquor for personal use, therefore the Webb-Kenyon Act did not apply, since it only applied to things which the state law prohibited."

While the statute might seem to forbid the shipment and receipt of liquor, it will be noted that the state court had expressly held that the statute did not prohibit this, and it was upon the strength of the state court so ruling that this Court held the Webb-Kenyon Act inapplicable. However, in order that the extent of the holding in the *Adams Express Company* case might not be misleading in the slightest degree, and in order that the extent to which the Webb-Kenyon Act removed intoxicating liquors from the protection of interstate commerce might be fully understood, the Court referred to the case of *VanWinkle v. State,* 27 Del. 578. In that case the state law under consideration (Chap. 139, vol. 27) was stated by the state court as follows:

Van Winkle v. State, 27 Del. 578.

"Sec. 1. That it shall be unlawful for any common carrier, knowingly to accept or receive for shipment, transportation or delivery to any person or place within local option territory, or to carry, bring into, transfer to any other person, carrier, or agent, handle, deliver, or distribute in local option territory, any spiritous, vinous, or malt liquor, regardless of the name by which it may be called. * * *

"Sec. 4. This act shall apply to all packages of spiritous, vinous or malt liquor, whether broken or unbroken * * *.

"Sec. 6. That it shall be unlawful for any person to carry, bring, or have brought any quantity of spiritous, vinous, or malt liquor from any point within the State of Delaware into local option territory within said state greater than one gallon within the space of twenty-four hours."

This act, known as the Hazel Law, prohibited commerce in liquor between other States and prohibited districts in this State when the liquor was to be used for any purpose, other than medicinal and sacramental. It was admitted that the liquor was intended by the consignee to be personally used and that he did not intend to sell or otherwise unlawfully dispose of the same. The state court said that such "Hazel Law prohibited the shipment of liquor into a prohibited district * * * whether the liquor be intended to be used in violation of the law or not," and went on to state that the "Webb-Kenyon Act prohibited the shipment of liquor only when the liquor is intended to be used in violation of the law of the State," and that as the Hazel Law was either copied from a similar law in Kentucky or the two laws were taken from a common source, that, therefore, following the ruling in the *Adams Express Company* case, 154 Ky. 462, it would hold that the Webb-Kenyon Act did not apply. But the Supreme Court in the *Clark Distilling Co.* case, referring directly to this *VanWinkle* case, at page 324, went on to state:

"It is true in that case the state law prohibited shipment to and receipt of intoxicants in local option territory, and if the Webb-Kenyon law had been applied, there would have been no possible ground for claiming that the state prohibitions could be escaped because the liquor was shipped in interstate commerce. But the shipment was held to be protected as interstate commerce despite the state prohibition because the Webb-Kenyon law was not correctly applied, for the following reason: Coming to consider the text of that law, the court said that as the

Apparent Doctrine of Adams Express Co. v. Kentucky, 238 U. S. 190 as Stated in Van Winkle Case Expressly Repudiated.

Webb-Kenyon Act prohibited the shipment of intoxicants 'only when the liquor is intended to be used in violation of the law of the state', and as the liquor shipped was intended for personal use, which was not forbidden, therefore the shipment, although prohibited by the state law, was beyond the reach of the Webb-Kenyon Act. But we see no ground for following the ruling thus made since, as we have already pointed out, it necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that act did not simply forbid the introduction of liquor into a State for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law."

Interstate Commerce Protection Completely Removed from Liquor Shipments.

1917.

SEABOARD AIRLINE RY. v. NO. CAROLINA
245 U. S. 298;
38 S. C. 96;
62 L. Ed. 299.

An act of North Carolina required railroad companies to keep a separate book in which shall be entered the name of every person to whom intoxicating liquor is shipped, together with certain other data, and that the same shall be open for inspection by any officer or citizen; and the railway company was prosecuted for an alleged violation of such act. The carrier defended itself upon the ground that it could not comply with the state statute without violating the interstate commerce clause. At page 303 the Court said:

"* * * Since our decision in Clark Distilling Co. v. Western Maryland Railway Co., 242 U. S. 311, 320, 324, it has not been open to serious question that the Webb-Kenyon Law is a valid enactment; that 'its

purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor in said commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught'; and that under it a State may inhibit shipments therein of intoxicating liquors from another by a common carrier although intended for the consignee's personal use where such use is not actually forbidden. Plainly, therefore, after that enactment, nothing in the laws or Constitution of the United States restricted North Carolina's power to make shipments of intoxicants to Wake County a penal offense irrespective of any personal right in a consignee there to have and consume liquor of that character.

Webb-Kenyon Act Allows State to Prohibit Shipments Even Though State Permits Use and Traffic in Liquor.

"The challenged act instead of interposing an absolute bar against all such shipments, as it was within the power of the State to do, in effect permitted them upon conditions intended to secure publicity, to the end that public policy might not be set at naught by subterfuge and indirection. The greater power includes the less."

The Court, then expressly referring to the defense of the interstate commerce provisions, says, at page 304:

Congress Abdicates Control of Interstate Shipments of Liquor in Favor of States.

"The provisions of section 15, Act to Regulate Commerce, here relied on were intended to apply to matters within the exclusive control of the Federal Government; and when by a subsequent act Congress rendered interstate shipments of intoxicating liquors subject to state legislation, those provisions necessarily ceased to be paramount in respect of them."

1917. VIII.

Mar. 3. **Reed Amendment.**

"Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State, Territory, or the District of Columbia, the laws of which prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes, shall be fined not more than $1,000 or imprisoned not more than six months, or both; and for any subsequent offense shall be imprisoned not more than one year."

This was offered by Senator Reed as an amendment to the Postal Service Appropriation Bill. There was practically no debate upon this amendment as adopted in its above form. Senator Reed in offering it stated:

. . . "Ever since the decision of the Supreme Court in the West Virginia cases all doubt has been removed as to the right of the Federal Government to absolutely prohibit the shipment of liquor in interstate commerce. That decision declared that liquor is in a class by itself, subject to rules peculiar to that particular class."

Senator Reed.

Vol. 54 *Cong. Rec.* p. 3331.

As originally offered, this amendment contained an additional provision prescribing a penalty for the person within the State who used such liquor. But this was rejected upon the strength of Senator Borah's objection that it would be unconstitutional as an invasion of the State's exclusive jurisdiction over purely local matters.

Rejected Provision.

The meaning and intent of the Reed Amendment is so clear and unambiguous that it has not been open to question. This was merely a prohibition by Congress of interstate shipments in certain instances, aside from State regulation thereon, and regardless of whether or not the States had restricted or prohibited such shipments.

1918. UNITED STATES v. DAN HILL
248 U. S. 420;
39 S. C. 143;
63 L. Ed. 337.

The laws of West Virginia forbade the manufacture and sale of intoxicating liquors, but did not forbid their personal use. Hill purchased a quart of liquor in Kentucky for his personal use and boarded a trolley car with the whiskey upon his person and carried the same into West Virginia. He was prosecuted for violation of the Reed amendment. Referring to the three acts governing interstate transportation of liquor, the Court, at page 424, said:

Comparison of Wilson, Webb-Kenyon, and Reed Acts.

"Congress in the passage of the Reed amendment, must be presumed to have had, and in our opinion undoubtedly did have, in mind this well known and often declared meaning of interstate commerce. It had already provided in the Wilson Act for state control over liquor after its delivery to the consignee in interstate commerce. In the Webb-Kenyon Act it had prohibited the shipment of liquor in interstate commerce where the same was to be used in violation of the law of the State into which it was transported. In the passage

of the Reed Amendment it was intended to take another step in legislation under the authority of the commerce clause. * * * The order, purchase, or transportation in interstate commerce, save for certain excepted purposes, is forbidden."

And on page 427, it continues:

"In view of the authority of Congress over the subject matter, and the enactment of previous legislation embodied in the Wilson and Webb-Kenyon laws, we have no question that Congress enacted this statute because of its belief that in States prohibiting the sale and manufacture of intoxicating liquors for beverage purposes the facilities of interstate commerce should be denied to the introduction of intoxicants by means of interstate commerce, except for the limited purposes permitted in the statute which have nothing to do with liquor when used as a beverage. That the State saw fit to permit the introduction of liquor for personal use in limited quantities in no wise interferes with the authority of Congress, acting under its plenary power over interstate commerce, to make prohibition against interstate shipments contained in this act. It may exert its authority, as in the Wilson and Webb-Kenyon Acts, having in view the laws of the State, but it has a power of its own, which in this instance it has exerted in accordance with its view of public policy."

Congress thus by the Reed Amendment, was held to be exercising its own prerogative to regulate the transportation of intoxicating liquors in interstate commerce, in addition to the laws of the States permitting the importation and use thereof.

IX.

1920. **Eighteenth Amendment.**

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

1922. RAINIER BREWING COMPANY v. GREAT NORTHERN PACIFIC S. S. Co.
259 U. S. 150;
42 S. C. 436;
66 L. Ed. 868.

This case, while decided after the Eighteenth Amendment, arose in 1917 and was based upon the Wilson and Webb-Kenyon Acts.

State Permitted Use of Liquor But Provided Certain Restrictions Upon Importation.

The brewing company shipped two carloads of beer from California consigned to a transfer company at Seattle, Washington, containing 2,565 separate packages addressed to separate individuals. When the shipment reached Portland, the Northern Pacific Co. refused to accept the same upon the ground that it could not lawfully carry such intoxicating liquors in carload lots into the State of Washington.

The Washington law limited the amount of liquor which any person could bring into the State at one time to not more than twelve quarts of beer or one-half gallon of

other liquor, and this could only be imported under a permit issued by a County Auditor, limiting one such permit to one person in any statutory period. It also further required that the permit should be conspicuously affixed to each package, required the same to be plainly marked "Intoxicating liquors", and forbade any carrier to transport the same except in compliance with such requirements. The personal use and possession of such liquor was, of course, permitted under the state law. At page 152 the Court said:

> "The Webb-Kenyon Act prohibited 'the shipment or transportation in any manner or by any means whatsoever' of any intoxicating liquor of any kind from one state to another state to be received or in any manner used in violation of any law of any such latter state. With these laws in force at the time, the railroad company could carry the beer into Washington only when labeled as required by section 240, *supra*, and in the manner allowed by the laws of the state, which we shall briefly consider."

After referring to the terms of the Act, the Court at page 154 said:

Washington Restrictions Upon Importing Liquor More Stringent and Burdensome Than California A.B.C. Act.

> "This statement of the applicable law shows that the purpose of the legislation was to make the transportation of intoxicating liquors into the State of Washington as difficult, conspicuous and expensive as possible. Only an individual could qualify to ship or receive it, and it was intended that it should move only in a single package of strictly limited quantity with a permit attached, showing its origin, destination, and the name of the shipper, who must also be the ultimate consignee. * * *

"The marking of the packages, required by both the federal and the state law, advised the railroad company of the character of their contents and as to the real consignee and that they resided in Seattle and we think, therefore, that it was clearly its duty to refuse to carry the beer in carload bulk shipment for delivery to the transfer company, * * *."

This case clearly demonstrates that the Webb-Kenyon Act does remove the protection of the commerce clause from the transportation of liquor into a state contrary to its rules and regulations, even though the use and possession of such liquor is not prohibited and is lawful.

1932. McCormick & Co. v. Brown
286 U. S. 131;
52 S. C. 522;
76 L. Ed. 1017.

The constitution of West Virginia prohibited the manufacture, sale, and keeping for sale of malt, vinous, or spiritous liquors, wine, porter, ale, beer or any intoxicating drink, mixture or preparation of like nature, except "such liquors for medicinal, pharmaceutical, mechanical, sacramental and scientific purposes."

This action "was brought by non-resident manufacturers and wholesale dealers to restrain state officers of West Virginia from requiring the complainants to obtain permits from the State Commissioner of Prohibition, and to pay an annual license fee of $50.00, before shipping certain products into the state to purchasers there for resale. It was not intended that such liquor was to be shipped into the State to be used in violation of any of its laws, and it was contended that it was unlawful on the part of the State to require any license fee

or to place any other regulation or restriction upon the importation thereof.

Mr. Chief Justice Hughes in delivering the opinion of the Court, at page 140, said:

> "Prior to the adoption of the Eighteenth Amendment, the Congress, exerting its constitutional powers of regulation, had prohibited the movement in interstate commerce into any state of intoxicating liquors for purposes prohibited by the state law. (Citing the Webb-Kenyon Act, the Wilson Act, and the Reed amendment.) With direct application to the prohibition law of West Virginia (the predecessor of the present statute and having a similar definition of 'liquors,' West Virginia Laws 1913, Chap. 13), this Court held that the purpose of the Webb-Kenyon Act 'was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through said commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught.' * * * The appellants do not urge, and there would be no grounds, for such a contention, that either the Eighteenth Amendment or the National Prohibition Act had the effect of repealing the Webb-Kenyon Act. The Congress has not expressly repealed that act, and there is no basis for an implication of repeal. * * *"

Continuing at page 142 the Court said:

> "The Congress undoubtedly recognized, as this court had decided, that the state could prohibit the sale of liquor absolutely or conditionally. It could prohibit sale as a beverage and permit sale for medicinal and like purposes. It could prohibit sale by merchants and permit it by licensed druggists." (Citing cases.)

The Court in this case finally and decisively disposes of the contention that the Webb-Kenyon Act applies only where there is an attempt to violate the laws of the state into which the shipment is to be made, saying at page 143:

> "The appellants make the further point that the Webb-Kenyon Act applies only where there is an intent to violate the laws of the state into which the shipment is made. The Act prohibits the shipment or transportation of intoxicating liquor into a state when it 'is intended, by any person interested therein, to be received, possessed, or in any manner used * * * in violation of any law of such state.' The argument is that no intent to violate the laws of West Virginia can be imputed to the appellants. It is said that they ship their products only to licensed dealers in West Virginia, that is, to those who are authorized by the State Commissioner of Prohibition 'to receive, store, and sell the same.' The short answer is that the state law does not make the permits issued to local dealers a substitute for the permits required of wholesale dealers. If the provisions of the state law, and the regulations under it, which expressly require state permits for sales by wholesale dealers of the products in question, are valid, it necessarily follows that sales by appellants of these products without such permits would be a violation of the state law within the meaning of the Webb-Kenyon Act. The appellants in making the sales are obviously interested persons, and the shipment of their products into the state for the purpose of consummating their sales without the described permits would fall directly within the terms of that Act."

X.

1932. TWENTY-FIRST AMENDMENT.

Original Form.

The proposal to repeal the Eighteenth Amendment, terminating in the adoption of the Twenty-first Amendment to the Constitution, as proposed in Senate Joint Resolution 211 in December, 1932, contained a specific proposal to remove the protection of the interstate commerce clause from intoxicating liquors *only* when the same moved into the prohibition or so-called bone dry states, and read as follows:

Protection of Commerce Clause Specifically Removed from Liquor Only in Prohibition States.

"Section 1. The provisions of clause 3 of Section 8 of Article I of the Constitution . . . shall not be construed to confer upon the Congress the power to authorize the transportation or importation into any state . . . . for use therein of intoxicating liquors for beverage or other purposes within the state or territory if the laws in force therein prohibit such transportation or importation; . . . ." (Vol. 76, Congressional Records, p. 65.)

Judiciary Committee Changes to Present Form.

On January 9, 1933, the Senate Judiciary Committee presented its report on this Resolution, recommending as a complete substitution therefor the Amendment in its present form, with the addition of an added section, which latter was subsequently removed. (Vol. 76, Congressional Records, p. 1621.)

Congressional Debate: Senator Blaine.

Senator Blaine of Wisconsin, representing the Judiciary Committee, in discussing the recommendation of such Committee, said:

Comment on Wilson Act.

"First, however, we had what is known as the Wilson Law. That law was treated in the case of Rhodes v. Iowa, 170 U. S. 412; but the Supreme Court in that case gave rather a restricted construction of the language used by Congress, and held that under the Wilson Act the interstate character attached to the liquor until it had actually been delivered to the consignee. . . .

Comment on Webb-Kenyon Act.

. . . The Webb-Kenyon Act was interpreted by the Supreme Court of the United States in the case of Clark Distilling Company v. Western Maryland Railway, 242 U. S. 311. The language of the Webb-Kenyon Act was designed to give the states in effect power of regulation over intoxicating liquor from the time it actually entered the confines of the state; and the Supreme Court held that it was following the doctrine laid down in the case of Rhodes v. Iowa, and necessarily must follow that doctrine in order to sustain the decision it was making in the case of Clark against Maryland Railroad Company. . . .

In the case of Clark against Maryland Railway Company there was a divided opinion. There has been a divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So, to assure the so-called dry states against the importation of intoxicating

liquor into those states, it is proposed to write permanently into the Constitution a prohibition along that line." (Vol. 76, Congressional Records, pp. 4140, 4141.)

And referring again to the second paragraph of the present amendment he said (page 4143):

Purpose of Sec. 2 Stated.

"* * * The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States * * *"

Senator Borah.

Senator Borah, a recognized authority on constitutional law, speaking on this proposed amendment before the Senate, said:

Restoration of State Rights in Liquor Control.

"Mr. President, I wanted to say that this question of the right of the States, in the exercise of the police powers to control the liquor traffic within the States, was fairly and squarely presented in many cases to the Supreme Court, always a portion of the court contending that the police power should be permitted to be exercised by the States to the full extent within the boundaries of the States. * * * The people had declared they wanted to be rid of this evil, or at least to control it their own way. These States were invaded, their laws broken, their officials corrupted, by the same influences which now plead for State's rights and local control. They did not at that time respect that right at all. They trampled upon it and scoffed at it. Therefore, if we are to have what we are now promised, local self government, State rights, the right of the people of the respective States to adopt and enjoy their own policies, we must have

some other method, some other provision of the Constitution, than those which existed prior to the adoption of the Eighteenth Amendment.

All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating it permanently in the Constitution of the United States." (Vol. 76, Congressional Record, page 4172.)

In order that there might be no question but that the protection to be afforded by Congress in the removal of the interstate commerce provision should be extended only to the so-called "bone dry" States, Senator Glass of Virginia offered as an amendment a substitute containing the following language, which amendment was eventually rejected (Vol. 76, Congressional Record, page 4211):

Senator Glass' Substitute.

"The sale of intoxicating liquors within the United States * * * for consumption at the place of sale, and the transportation of intoxicating liquors into any State * * * in which the manufacture, sale, and transportation of intoxicating liquors are prohibited by law, are hereby prohibited * * *."

In explaining this amendment, the Senator said (p. 4219):

Applies Only to Prohibition States.

"* * * In my own interpretation of the resolution as I have presented it, there can be no consignee of intoxicating liquors in a dry State. Liquors may be shipped across a State in interstate commerce from one wet State to another wet State, but the resolution as I have drafted it prohibits the shipment of intoxi-

cating liquors into a State whose laws prohibit the manufacture, sale or transportation of liquors. So I have met the objection that we are undertaking to interfere with interstate commerce as between States which authorize the manufacture, transportation, and sale of liquors; * * *"

Congress Chooses Between Application of Amendment to All States or Only to Bone-Dry States.

From this it will be seen that Congress had squarely before it the question of whether or not the proposed constitutional amendment should remove the protection of interstate commerce from the shipment of liquors into all States contrary to their laws, or simply into States which are bone dry. That there was no question in the mind of Congress as to the meaning of the provision is shown by the language of Senator Robinson of Arkansas who said, at page 4225:

Senator Robinson.

"The language of section 2 is perfectly plain. (Quoting same.) That leaves to the State the power of regulation; it places the moral force of the government of the United States behind the State in the enforcement of their laws; * * *"

In the House, Mr. McSwain said (page 4522):

Representative McSwain.

"The proposed amendment to the Constitution is, in effect, a proposal to repeal the Eighteenth Amendment, but also to give a constitutional guarantee that the transportation or importation into any State of intoxicating liquors, in violation of the laws of such State, shall be prohibited forever."

1933.
Dec. 5.

The Twenty-first Amendment to the United States Constitution as finally proposed by Congress to the States on February 20, 1933, and as ratified by the requisite number of States and in force December 5th, 1933, was in the exact language as reported out by the Senate Judiciary Committee as follows:

Final Form.

"Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

Decisions Under the Twenty-First Amendment.

So far as we are at present aware, all of the decisions construing the Twenty-first Amendment to the United States Constitution have been confined to judgments of the District Courts of the United States.

Premier Pabst Sales Co. v. McNutt.

1935.
Jan. 4.

D. C. (Indiana) Jan. 4, 1935.

The above action, in which no opinion has appeared in any report to our knowledge, was begun to enjoin the enforcement of the Alcoholic Beverage

Control Act of Indiana. By the provisions of the Indiana Act the State was divided into ten districts, and one party in each district was appointed as the official importer and no other importers were allowed. Each importer was required to pay an annual license fee of $2,500, and while the domestic manufacturer of beer was required to pay the same license fee, the latter had the whole State for his market, while the importer could only dispose of his imported beer in the particular district in which he was located. Under this arrangement, the foreign brewer who wished to compete with the local manufacturer had to provide an outlet in each of the ten districts, which, at the fee of $2,500 each, aggregated $25,000, in order to cover the State to the same extent and to compete with the local brewer. There could be no question but that the statute strongly discriminated against imported beer and in favor of local beer.

The District Court dismissed the attack upon the constitutionality of the statute made upon the grounds that it was in violation of the Fourteenth Amendment and the equal rights clause, holding that these did not apply to the regulation of liquor. It then referred to various decisions of this Court construing the Webb-Kenyon Act and said:

> "A State may prohibit the liquor traffic within its borders altogether, thereby prohibiting the shipment of intoxicating liquor into the State altogether. This is not in violation of the commerce clause of the Federal Constitution. Therefore the power of absolute prohibition gives the State the lesser power of prescribing by law the condition under which such shipment may be allowed."

Fry v. Rosen, 198 N. E. 375.

The District Court also called attention to the decision of the State Court of Indiana in *Fry v. Rosen,* 198 N. E. 375, involving the same liquor act, in which that Court had said:

> ". . . A vendor of alcoholic malt beverages who does business outside of Indiana has no right or privilege to transport such beverages into Indiana by reason of any protection afforded by the interstate commerce clause of the Federal Constitution."

Appeal to U. S. Supreme Court Dismissed.

In this last case an appeal was prosecuted by Rosen to the United States Supreme Court, which dismissed the same upon the ground that the jurisdictional statement failed to disclose any properly presented substantial Federal question (*Rosen v. Fry,* 296 U. S. 526, 55 S. C. 143, 79 L. Ed. 636). Paragraph 4 of the jurisdictional statement referred to said that it was the contention of appellants that the sections of the act in question were repugnant to the commerce clause and to the Fourteenth Amendment to the Federal Constitution.

1935. June 29.

TRINER CORPORATION v. ARUNDEL (Minn.), 11 Fed. Supp. 145.

A Minnesota statute enacted in 1935 provided that "no licensed manufacturer or wholesaler shall import any brand or brands of intoxicating liquors * * * unless such brand or brands shall be duly registered in the Patent Office of the United States." The brand of the Triner Corporation was not so registered, and the State officials served notice upon such corporation that it could no

longer import any of such of its brands into Minnesota. Referring to the Twenty-first Amendment, the court, at page 146, said:

> "With the contention that by this language it was intended that intoxicating liquors should be excepted from the provisions of the Commerce Clause and other provisions of the Constitution of the United States, we are unable to agree. The purpose of the provision referred to was to make it impossible for Congress to permit the transportation or importation into any State, Territory, or possession of the United States of intoxicating liquors in violation of the laws of the State, Territory, or possession. In other words, the provision left the State, Territory, and possession free to determine to what extent, if at all, intoxicating liquors should be a lawful subject of commerce within their limits."

Leaves State Free to Determine to What Extent Liquor Shall Be Subject of Commerce.

The case was not decided on the commerce clause. The Minnesota Act did not require brands of liquor manufactured within the State to be registered and the court considered this a discrimination and stated (p. 147):

> "* * * We think it is only necessary to consider one question, and that is whether Chapter 390 denies to the plaintiff the equal protection of the law."

Case Turned Upon Equal Protection and Not Upon Commerce Clause.

The Court then reached only one conclusion and that was that this statute did deny "to the plaintiff the equal protection of the law, and is therefore unconstitutional."

The next decision in point of time was the one from which this present appeal is being prosecuted.

1935.
Dec. 10.

PREMIER-PABST SALES CORPORATION v. GROSSCUP
(Penn.), 12 Fed. Supp. 970.

The precise point here in question was passed upon directly by the District Court of Pennsylvania in the above case.

The Pennsylvania statute discriminated between distributors of beer made within the State and distributors of imported beer. The annual license fee for the former being four hundred dollars and for the latter nine hundred dollars.

Same Constitutional Provisions Urged as in Present Appeal.

The District Court considered squarely whether or not this discrimination was a violation of the Federal Commerce Clause, of the Fourteenth Amendment, and of Section 2 of Article IV of the Federal Constitution, the same three provisions which the plaintiff in the present action urged were being violated by the California law. The District Court of Pennsylvania, after considering the Wilson Act, the Webb-Kenyon Act, and the Reed Amendment and finally the Twenty-first Amendment, said at page 972:

Statement of Extent of 21st Amendment.

"Under the Twenty-first Amendment when a State passes a law upon the subject of the importation of intoxicating liquors all importation in violation of that law is forbidden by the Constitution and laws of the United States. . . . It further follows that the commerce clause availed the plaintiff nothing."

The Court then referred to the *Triner Corp.* case, the *Young's Market Co.* case here in question, and a Georgia case for which we have found no reported opinion, and after considering the same, said at page 973:

Triner Case and Present Case Reviewed.

> "It is here that we find ourselves in disagreement with what we are asked to find in the opinion of the cited case. It is that any State law that interferes with the importation of intoxicating liquor into the State is in conflict with the commerce clause of the Constitution and hence a nullity.
>
> "We adhere to the view, before expressed, that if it cannot be imported without a violation of the law of the State, its importation is declared unlawful by the Webb-Kenyon Act and by the Twenty-first Amendment, and it is hence without the operation of the Commerce Clause."

This *Grosscup* case was carried to the Supreme Court where it was affirmed May 18, 1936, 56 S. Ct. 754, but this Court declined to pass upon the Constitutional question and based its affirmance upon the fact "that the plaintiff is without standing to present it."

1936.

GENERAL SALES & LIQUOR CO. v. BECKER (Mo.), 14 Fed. Supp. 348.

Feb. 10.

The Missouri Liquor Control Act required a non-resident wholesaler to pay the same annual license fee as a resident wholesaler, but prohibited such non-resident from selling directly to retail dealers and required him to sell only to or through other wholesalers. It was contended that this violated both the commerce clause and equal protection of the Fourteenth Amendment. That Court, after discussing the various

acts of Congress limiting interstate commerce in regard to liquor, said at page 350:

"The adoption of the Twenty-first Amendment has without doubt limited and qualified the commerce clause to the extent that State laws, regulating the importation of liquor into a State, placed no prohibited burden upon commerce. This conclusion is in complete accord with that of the District Court in Joseph Triner Corp. v. Arundel, 11 Fed. Supp. 145, where it was determined that the purpose of the Amendment was not to except intoxicating liquors from the provisions of the Commerce Clause. The Amendment does recognize the authority of the State to regulate the movement of liqour into the State, and where availed of; as in this case, the importation of intoxicating liquors in violation of local law is outside the Commerce Clause.

". . . This gives this plaintiff no cause of complaint that a burden has been placed upon interstate commerce, because the State having acted, the liquor imported has to that extent lost its character as an article in interstate commerce. There is no basis for the contention made by plaintiff that the statute must fall because it places a restriction upon commerce between the States."

State Laws Regulating Importation of Liquor No Longer Come Within Restrictions of Commerce Clause.

In its discussion of the Fourteenth Amendment, the Court recognized that "it would be an impossible task for the State to inspect premises and products, and enforce regulation beyond its borders", and it was recognized that a distinction between home brewed liquor and imported liquor was wholly justifiable and was not discriminatory nor violative of any Constitutional provision.

Distinction Between Local and Imported Liquor Justifiable.

1936.
Feb. 28.

PACIFIC FRUIT & PRODUCE CO. v. MARTIN
(Wash.)

We do not find the above case which was decided Feb. 28, 1936, in the District Court for the Western District of Washington, Southern Division, reported as yet. That Court follows the present case of the Young's Market Co. on which it relies to a large extent, and expressly disagrees with the Grosscup decision. Its conclusion may be summed up in the following paragraph:

Young's Market Case Followed.

Grosscup Case Repudiated.

> "While it may be conceded that the intent of the Wilson Act, etc., and the Twenty-first Amendment was to take from intoxicating liquor the protection of the Interstate Commerce Clause in so far as necessary to deny them an advantage over the intoxicating liquors produced in these States into which they were brought, yet, none of them show an intent or purpose to so abdicate control over interstate commerce as to permit discrimination against intoxicating liquors brought into one State from another."

1936.

PHILIP BLUM & CO. v. HENRY
(Wis. 3-28-36).

Mar. 28.

The above case does not appear to have been reported. It was decided March 28, 1936, by the District Court for the Eastern District of Wisconsin.

Like the Missouri statute heretofore referred to, the Wisconsin Act required non-residents to pay an annual fee of $500 in order to sell liquor in that State, and $10 for

each salesman so employed. This fee permitted the holder of the license to sell only to manufacturers or wholesalers, whereas the same fee paid by residents allowed them to sell to manufacturers and wholesalers and retailers as well.

> "The complaint therefore seems to be that the fee has been increased from $1.00 to $500.00, and that in spite of such increased fee, non-residents are prohibited from selling to retailers, whereas Wisconsin wholesalers may do so."
>
> "At the threshhold of the application it is necessary to consider the interpretation and scope of the 21st Amendment * * * * * * * It deals solely with the subject of transportation or importation into any State."

The Court, after discussing the intent of the 21st Amendment, as denoted by the language thereof, says:

> "The query is at once prompted, Can it be possible that the language of the Amendment may be so ignored that Congress may still regulate interstate commerce — in intoxicating liquor,—by authorizing transportation into any State, notwithstanding interdiction by the State? Or that it must be held, notwithstanding the Amendment, that the right to transport intoxicating liquors into any State is guaranteed by other articles of the National Constitution as a 'privilege or immunity' of a citizen of the United States; or to 'citizens of the several States'; or as a guaranteed protection of equal laws? We regard these contentions as repugnant to the plain words of the articles."

Plain Words of Amendment Held to Remove Protection of Other Provisions of Constitution From Importation of Liquor.

Speaking of the distinction between "importers" and local dealers, the court said:

Distinction in Classification Between Importers and Local Dealers Recognized.

"* * * In order to deal properly with those who traffic both from without and within the State, a classification between those two groups of traffickers, cannot *prima facie* be called arbitrary or unreasonable, or as not germane to the ultimate objective."

In view of this long congressional history, from which the Twenty-first Amendment was evolved, and the decisions of the lower Federal courts construing it and the decisions of this Court applying the Webb-Kenyon Act, its congressional prototype, the purpose of the American people is clearly and emphatically registered by this Amendment to restore to the States their full sovereignty and authority to control liquor. This gives the States the power to prohibit, limit or regulate importations thereof and to do so without regard to discrimination as between such imports and domestic liquor.